TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 313.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF
WYANDOTTE COUNTY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 27, 1912.

(23,309)

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1 In the Supreme Court of the State of Kansas.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Be it remembered, that on the 9th day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, an Affidavit and Motion for a Writ of Mandamus, which are in words and figures as follows, to-wit:

2 In the Supreme Court of the State of Kansas.

No. 18064.

Filed Feb. 9, 1912. D. A. Valentine, Clerk Supreme Court.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Affidavit and Motion for a Writ of Mandamus.

Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the Court:

That the plaintiff, The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of chapter 215 of the Session Laws of the State of Kansas.

That the defendant The Kansas City Southern Railway Company, is a corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars worth of property lost by reason thereof.

That the federal government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the statutes of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said District, and further empowered
3 by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Ohio bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant, to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels, being duly sworn on oath, says that he is the President of the Board of Directors of The Kaw Valley Drainage District Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a writ of mandamus and that the matters and things therein stated and set forth are true.

4 And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridges without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossibble to try said cause in the District Court of Wyandotte County and secure a hearing upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June and July.

And further affiant saith not.

W. H. DANIELS.

Subscribed and sworn to before me this 8th day of February, 1912.
[SEAL.] MADELON DEROCHE,
Notary Public.

My Commission expires Jan. 11, 1916.

Endorsed: 18064. The Kaw Valley Drainage Dist. of Wyandotte

COPY BOUND

Co., Kan., Pl'ff, vs. The Kansas City Southern Ry. Co., Def't. Motion for Alternative Writ of Mandamus and Affidavit of Jurisdiction. Filed Feb. 9, 1912. D. A. Valentine, Clerk Supreme Court.

5 And also on the said 9th day of February, 1912, the same being one of the regular judicial days of the January term, 1912, of the Supreme Court of the State of Kansas, before the said court in session at the Supreme Court Room in the City of Topeka; the following proceedings among others was had, and entered of record as follows, to-wit:

6 In the Supreme Court of the State of Kansas.

FRIDAY, *February* 9, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN R'L'Y CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Allowing Petition for Alternative Writ of Mandamus.

Now comes the plaintiff herein by C. W. Trickett, its attorney, and presents its verified petition for an alternative writ of mandamus herein; and thereupon after due consideration by the court, it is ordered that the alternative writ of mandamus issue to the defendants as prayed for in such petition, returnable on Tuesday, February 20, 1912, at 9:30 o'clock A. M.

7 And also on the 17th day of February, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a stipulation extending the time of the defendant in which to make their return and answer to the alternative writ, which is in the words and figures as follows, to-wit:

CLOSE IN CENTER

8 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto and their attorneys, that the defendant shall have ten days from and after Tuesday, February 20, 1912, within which to make return to the alternative writ in the above entitled cause.

KEPLINGER & TRICKETT,
S. W. MOORE &
O. L. MILLER,
Att'ys for Defendant.

Endorsed: 18064. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District Wyandotte County, Kansas, Plaintiff, vs. The Kansas City Southern Railway Company, Defendant. Stipulation. Allowed this 17th day of Feb., 1912. W. A. Johnston, Chief Justice. S. W. Moore & Miller & Miller. Filed Feb. 17, 1912. D. A. Valentine, Clerk Supreme Court.

9 And afterward and on the 17th day of February, 1912, the same being one of the regular judicial days of the January term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among other- was had, and remains of record as follows to-wit:

10 In the Supreme Court of the State of Kansas.

SATURDAY, *February* 17, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Stipulation.

On stipulation it is ordered that the defendant be allowed ten days from February 20, 1912, within which to make return to the writ of mandamus.

11 And also on the 1st day of March, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the answer and return of the defendant to the alternative writ, which is in the words and figures as follows, to-wit:

12 In the Supreme Court of the State of Kansas.

Filed Mar. 1, 1912. D. A. Valentine, Clerk Supreme Court.

No. —.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein, says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas River within the Drainage District, which is usually termed "the Ohio Bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the State of Missouri, and is a resident and citizen of said State of Missouri and not a resident or citizen of the State of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of trans-

13 porting cars loaded with freight of all kinds in transit from the State of Missouri and from States other than Kansas to and into Wyandotte County and State of Kansas, and from Wyandotte County in the State of Kansas to the State of Missouri and to states other than the State of Kansas.

That the defendant's railway tracks extend from Jackson County, State of Missouri, into and through Wyandotte County and State of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the State of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas

at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the State of Missouri extend to and into Wyandotte County, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio Bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio Bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said
14 defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas River 6.5 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas River since it will be unable to either go on to or off said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the de-
15 fendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the
16 provisions of Section 1, of Article 14, of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

S. W. MOORE,
S. W. SAWYER, AND
O. L. MILLER,
Attorneys for Defendant.

STATE OF KANSAS,
County of Wyandotte, ss:

O. L. Miller, being duly sworn says that he is one of the attorneys for the defendant in the above entitled action and is authorized to make this affidavit. That he has read the foregoing return and answer and knows the contents thereof, and that the statements therein made are true as he is informed and verily believes.

O. L. MILLER.

Subscribed and sworn to before me, a notary public in and for Wyandotte County and State of Kansas, this 29th day of February, 1912.

W. E. NELSON,
Notary Public.

My commission expires Sept. 30th, 1912.

Endorsed: 18064. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District Wyandotte County, Kansas, Plaintiff, vs. Kansas City Southern Railway Company, Defendant. Return and Answer of the Defendant to the Alternative Writ. S. W. Moore, S. W. Sawyer, O. L. Miller, Att'ys for Def't. Filed Mar. 1, 1912. D. A. Valentine, Clerk, Supreme Court.

17 Copy.

In the Supreme Court of the State of Kansas.

Filed Feb. 16, 1912. D. A. Valentine, Clerk Supreme Court.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

Writ of Mandamus.

The State of Kansas to the Defendant, The Kansas City Southern Railway Company, Greeting:

Whereas it has been made to appear to us by affidavit in words and figures as follows:

Affidavit and Motion for a Writ of Mandamus.

Comes now the Plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the Court:

That the Plaintiff, The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant, The Kansas City Southern Railway Company is a corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1905 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the Statu-es of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said District, and further empowered by

18 mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Ohio Bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant, to raise its said bridge 6.5 feet or to the required height of 240.26 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

———— ————,
Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels, being duly sworn on oath says that he is the President of the Board of Directors of The Kaw Valley Drainage District, Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a
19 writ of mandamus and that the matters and things therein stated and set forth are true.

And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridge without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossible to try said cause in the District Court of Wyandotte County and secure a hearing upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June or July.

And further affiant saith not.

———— ————.

Subscribed and sworn to before me this 8th day of February, 1912.

———— ————,
Notary Public.

My commission expires Jan. 11, 1916.

2—313

Now therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Ohio Avenue bridge over the Kansas River 6.5 feet or so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at 2 o'clock P. M. of said day and show cause by answer filed herein why you will not do so and have you then and there this writ with your return thereon showing that you have complied with or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon this writ and answer is hereby set for the — day of February, 1912.

20 In witness whereof, this writ is signed by the Chief Justice and the Clerk of the Supreme Court of Kansas is ordered to attest the same, with the seal of court attached this 9th day of February, 1912.

W. A. JOHNSTON,
Chief Justice.

Attest:
[SEAL.] D. A. VALENTINE,
Clerk Supreme Court.

Sheriff's Return.

STATE OF KANSAS,
County of Wyandotte, ss:

Received the within Writ of Mandamus Feb. 9, 1912, and served the same in my County on the within named Defendant, The Kansas City Southern Railway Company by delivering to Mike Kelley, personally, he being watchman for and in behalf of said Company at its office and usual place of business in Kansas City, Wyandotte County, Kansas, the original of which this is a true and certified copy, on the 13th day of Feb., 1912.

AL BECKER, *Sheriff,*
By G. W. WESTFALL, *Deputy.*

Service	$ .50
Mileage	.50
Non Est.	.....
Copy	.25
Total	$1.25

Endorsed: 18064. Kaw Valley Drainage Dist. vs. K. C. Southern Ry. Co. Writ Mandamus. Copy. Filed Feb. 16, 1912. D. A. Valentine, Clerk Supreme Court.

21 And also on the 1st day of March, 1912, there was filed in the Office of the Clerk of the Supreme Court of the State of Kansas, a stipulation to hear cause, which is in the words and figures as follows, to-wit:

22 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed that the above entitled cause shall be set down for argument on law points April 5th, 1912, at chambers, or at such time thereafter as the court can hear the same.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.
S. W. MOORE,
S. W. SAWYER &
O. L. MILLER,
Attorneys for Defendant, Kansas City Terminal Railway Company.

Endorsed on back: No. 1806. The Kaw Valley Drainage District of Wyandotte County, Plaintiff, vs. The Kansas City Terminal Railway Co., Defendant. Stipulation. Filed March 23, 1912. D. A. Valentine, Clerk Supreme Court.

23 And afterwards and on March 23rd, 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others, was had, and entered of record as follows, to-wit:

24 In the Supreme Court of the State of Kansas.

FRIDAY, *March* 22, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN R'L'Y CO., DeDfendant.

Journal Entry of Advancement.

On stipulation of counsel for both parties and for good cause shown it is ordered that the hearing of this cause be advanced upon the dockets of this court, to the 5th day of April, 1912.

25 And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the reply of plaintiff to the defendant's answer and return, which *are* in the words and figures as follows, to-wit:

26 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Reply.

Comes now the plaintiff and for reply to the return and answer of the defendant to the alternative writ denies each and every allegation therein contained, and specifically denies that the City of Kansas City, Kansas, has refused to make changes in the grades of streets, and alleges that the defendant has never made any request to the City of Kansas City, Kansas, for such changes.

And plaintiff further alleges that the bridge of the Kansas City Southern Railway Company is an unlawful structure and was placed in said river without any authority therefor on the part of either the War Department, the State of Kansas, the City of Kansas City, Kansas, or the Kaw Valley Drainage District.

And plaintiff further alleges that under and by virtue of an act of Congress commanding him so to do, the Secretary of War caused the Kansas River to be surveyed in the fall of the year 1909 and the fore part of the year 1910, for the purpose of establishing harbor lines and regulating and determining the height and length of bridges and on June 24th, 1910, established harbor lines and established the height and length of bridges, and promulgated said decree under and by virtue of said act and in said decree specified and named the bridge herein involved and decreed and ordered that said bridge be lengthened to the harbor lines and further ordered that it be raised to the height designated in the original writ
27 of mandamus herein specified, and that compliance with said writ of mandamus would be an actual and exact compliance with the orders of the War Department, to the fraction of an inch, and not a violation of any order of said War Department.

And plaintiff further says that under and by authority in it vested by the Legislature of the State of Kansas, it has investigated, taken evidence and determined that the height specified in the original writ herein issued was necessary for the purpose of preventing overflow and to protect lives and property of the people in said district and that the defendant herein had full knowledge thereof, said matter having been discussed with it and its engineers on numerous occasions, and plaintiff asks issuance of the writ of mandamus as originally prayed for.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

Endorsed: 18064. Kaw Valley Drainage Dist. vs. Kansas City Southern Ry. Co. Reply. Filed Apr. 2, 1912. D. A. Valentine, Clerk Supreme Court.

28 And also on *on* the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, amendments to the defendant's answer and return to the alternative writ, which are in the words and figures as follows, to-wit:

29 In the Supreme Court of the State of Kansas.

No. 18064.

KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Amendments to Defendant's Return and Answer.

1. On the last page, at the end of the first paragraph of said answer and return, add the following words:

"And in violation of the Fourteenth Amendment to the Constitution of the United States."

2. After the third paragraph on page three (3), add the following:

"That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon, would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, and the plaintiff has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor."

3. Just preceding the first paragraph on page four (4) add the following:

"That defendant's tracks on the east side of said bridge are intersected by the tracks of The Missouri Pacific Railway Company, St. Louis and San Francisco Railroad Company and Chicago Great Western Railroad Company; that if said bridge is raised, as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised, the tracks of said other lines of railway intersecting defendant's tracks would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; that the plaintiff has not arranged by voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised, and that the owners thereof refuse to raise the same."

30 4. Just before the prayer on the last page, add the following:

"Plaintiff herein has no power or authority under the statutes of the State of Kansas, or otherwise, to require the defendant's bridge, which is now build and in use, to be raised."

5. After the words "switching company" in line four (4), of paragraph two (2), on page two (2), add the following:

"In addition to its inter-state business as a common carrier of freight and passengers, and its main line of railroad crosses over said bridge and defendant carries thereon and thereover inter-state freight, both in carload and less than carload lots."

6. Put in just before the prayer the following:

"That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans for rebuilding the bridge in question and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal Officials."

S. W. MOORE,
S. W. SAWYER,
CYRUS CRANE &
O. L. MILLER,
Att'ys for Def't.

Consent given to make the above amendments to return and Answer.

KEPLINGER & TRICKETT,
Att'ys for Pl'ff.

Endorsed: 18064. Filed Apr. 5, 1912. D. A. Valentine, Clerk Supreme Court.

31 And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a motion of the plaintiff to withdraw their reply to the dedefendant's answer and return and for judgment upon the pleadings, which *are* in the words and figures, to wit:

32 In the Supreme Court of the State of Kansas.

No. 17064.

KAW VALLEY DRAINAGE DISTRICT, Plaintiff,
vs.
KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Comes now the plaintiff and asks leave of Court to withdraw its reply, and moves for judgment upon the pleadings.

KEPLINGER & TRICKETT,
Counsel for Plaintiff.

Endorsed: 18064. Kaw Valley Drainage Bd., Plaintiff, vs. K. C. Southern Rly., Def't. Motion of Pl'ff to Withdraw Reply and for Judgment on Pleadings. Filed Apr. 5, 1912. D. A. Valentine, Clerk Supreme Court.

33 And thereafter and on the 5th day of April, 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the state of Kansas, in session at the

Supreme Court Room in the City of Topeka, the following proceedings among others was had, and made of record, as follows, to-wit:

34 In the Supreme Court of the State of Kansas.

FRIDAY, *April* 5, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant,

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Submission.

This cause comes on to be heard on the pleadings filed herein, consisting of the alternative writ of mandamus, the answer and return thereto, and the reply of the plaintiff; the defendants, The Kansas City Southern Railway Company, and the Kansas City Terminal Railway Company appearing by O. L. Miller and Cyrus Crane their attorneys, upon application, are granted leave to file forthwith amendments to their answers and returns; the plaintiff, the Kaw Valley Drainage District of Wyandotte county, appearing by C. W. Trickett, one of its attorneys, upon application is given permission to withdraw the replies filed herein and to file motions for judgment on the pleadings, and to amend the alternative writ in the case against the Kansas City Terminal Railway Company, No. 18065, as set forth in the written motion filed therein. And thereupon said causes are submitted upon the motions for judgment on the pleadings, on briefs for both parties, and after oral argument by counsel, and taken under advisement by the court.

35 And thereafter, and on May 11th, 1912, the same being one of the regular Judicial days of the January Term 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court Room in the City of Topeka, the following proceedings among others, was had, and made of record, as follows, to wit:

36 In the Supreme Court of the State of Kansas.

SATURDAY, *May* 11, 1912.

No. 18,064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant,

No. 18,065

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the Saint Louis Directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the Saint Louis Directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $——, and hereof let execution issue.

37 And also on the said 11th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the opinion of the court in said cause, which is in the words and figures as follows, to-wit:

38 *Original Proceedings in Mandamus.*

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Writs Granted.

Syllabus by the Court.

WEST, *J.*:

1. The Kaw Valley Drainage District in its work of clearing the channel of the Kansas River at and near its mouth and in prescrib-

ing the height of bridges over such stream is exercising the police power of the State, and has the right to require railroad companies to elevate their bridges to correspond with the height of levees constructed by the board, its determination that such elevation is necessary being prima facie bona fide and valid.

2. It is no defense to an action to compel such elevation that such requirement would entail upon the railroad companies large expense or force them into controversies with the city and other railroad companies respecting the raising of grades made necessary by such elevation. Their rights and franchises must be deemed to be held subject to the necessity of complying with all reasonable requirements which the legislature may make or authorize in the exercise of the police power of the state.

39 3. Such requirement does not by reason of the consequent expense and difficulty amount to a violation of the contract, commerce, due process or equal protection clause of the federal constitution.

4. The plaintiff board, having no power to abrogate its authority by contract, is not bound to refrain from requiring such elevation by reason of an agreement in 1907 to treat a certain bridge of lower elevation as lawful and sufficient; the party thus contracting with the board being required to know that such contract, if construed to prevent other and different requirements as conditions should demand them, was ultra vires.

5. The plaintiff board cannot compel the elevation of the bridges in question until reasonable plans therefor are approved by the proper federal authorities.

All the justices concurring.

A true copy.

Attest:

Clerk Supreme Court.

40 The opinion of the court was delivered by WEST, *J.*:

The Kaw Valley Drainage District prays for a writ of mandamus against the Kansas City Southern Railway Co., compelling it to raise its bridge across the Kansas river 6.5 feet, and to remove its old bridge, superstructure, abutments, piers, piling and wreckage. The plaintiff alleges that the federal government established harbor lines along the river which lines coincide substantially with those established by the plaintiff for a levee; that by statute the plaintiff is given authority to determine the height of the superstructure of all bridges crossing the river within the drainage district and to compel the raising of bridges accordingly. That the defendant owns a bridge across the river within the district, that on or about July 15, 1911, it was notified by the plaintiff to raise its bridge 6.5 feet and to remove the old bridge, superstructure, abutments, piers, piling and wreckage but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri engaged in interstate commerce, its business being

that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri, to other railways in Kansas and placing such cars for unloading at the various industries along the line of defendant's road in Kansas and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the state of Missouri to and into Wyandotte county and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge. That if such connection is detsroyed or its use rendered unavailable the line will be separated and its business as an interstate carrier destroyed and the business of a large number of industries in Kansas greatly injured and in some cases destroyed.

That if the bridge is raised as prayed for the defendant's
41 business will be interrupted, its trains can not be transported across the river and its line of road will be cut and all its interstate business effectually destroyed. That the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount of private property abutting upon such streets would be seriously and permanently damaged by the change of grade and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade. That the defendant's tracks on the east side of the bridge are intersected by the tracks of three other railroad companies and if the bridge is raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that plaintiff has made no arrangements to have the same done; that a compliance with the demand of plaintiff would cost more than $30,000, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law and operate as a direct interference with and a prohibition of interstate commerce as the defendant carries over its lines interstate freight in car load lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge which application is pending and that such change can not be made without consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment
42 on the pleadings and although in the brief there is a long detailed statement of alleged facts we can only consider the case

upon the allegations contained in the writ and in the answer and return. There is no allegation in the alternative writ when the federal government established the harbor lines or when and in what manner the defendant constructed the present bridge and no direct allegation as to any old bridge, abutment, piers, piling or wreckage. All we can ascertain from the face of the pleading is that at some time the federal government established harbor lines which coincided substantially with the levee lines established by the plaintiff, that the defendant owns a bridge across the river which it has refused to raise in accordance with the notice and request of the plaintiff. The allegation in the answer that the plaintiff has no power or authority to require the bridge to be raised as demanded is possibly based upon the act of March 3, 1899, which provides (Sec. 9) that it shall not be lawful to construct any bridge over any navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the chief engineer and secretary of war. The allegation of the answer that application for such approval has been made and is still pending is attempted to be met by the plaintiff's brief which states that on June 24, 1910, the secretary of war ordered the defendant to do exactly what is now desired by the writ, but this allegation not being contained in the pleadings can not be considered.

Plaintiff also prays for a writ against the Kansas City Terminal Railway Co. to require it to raise its bridge, the allegations being practically identical with those already considered. To this the Terminal Company, after denying all allegations not expressly admitted, avers that it is a Missouri railway corporation engaged in interstate commerce, that its tracks extend from Jackson county, Missouri, into and through Wyandotte county, Kansas, and other allegations similar to those already made by the Southern
43 Company; further, that the demand of the plaintiff is unreasonable, illegal and arbitrary and would require either a total destruction of defendant's business or necessitate wrongful and illegal acts upon the public streets of Kansas City, Kansas. The answer further alleges that under a contract made on May 28, 1907, with the plaintiff, it was mutually agreed as a compromise and settlement of their differences then in litigation that the defendant would proceed to construct a permanent bridge in accordance with plans shown by a blue print attached to the contract, the plaintiff agreeing to such construction and declaring that when constructed it should constitute a lawful structure, not waiving any right to require the construction of an additional span from the west pier to any harbor line it had established or might thereafter establish. That pursuant to such contract the bridge was constructed at an expense of many thousands of dollars in exact accordance with such blue print and that after such contracts the defendant became owner by purchase of all the tracks heretofore belonging to the Kansas City Belt Railway Company and to the Belt Line Bridge and that no changes have occurred in the river since to warrant the demand sought by the plaintiff. That the plan for such bridge was submitted to and approved by the secretary of war and that the plans for the

bridge now demanded have not been submitted to or received the approval of the chief engineer or secretary of war as provided by the act of Congress March 3, 1899 (30 Stat. at Large, p. 1151), and that any deviation from the former bridge without such submission and approval would be unlawful.

The plaintiff added an amendment to its alternative writ and then asked for judgment on the pleadings. The amendment is that since the construction of the bridge and by virtue of a resolution of Congress February 16, 1909, the secretary of war, through the United States engineering department fixed harbor lines and decreed that the defendant's bridge should be raised. That since the erection of the present bridge the plaintiff ascertained and determined after the flood of 1908 the necessity of raising the bridge as demanded
44 and that upon order and request so to raise the same the defendant refused.

From the plaintiff's allegations concerning the bridge demanded we deduce that the war department and the plaintiff have ordered the defendant to raise its bridge to the height prayed for and that it has submitted plans to the war department for approval and that such approval has not been obtained or such application passed upon, but the allegation as to the decree of the secretary of war that the bridge be raised stands denied. To cover this gap the plaintiff produces certain blue prints or maps bearing the name of the acting secretary of war and purporting to have been prepared pursuant to a resolution of Congress of February 16, 1909, which resolution authorized the secretary of war to

"fix and establish pierhead and bulkhead lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as shall be prescribed from time to time by the Secretary of War."

These maps also state on their faces that they are

"To accompany report of this date (May 20, 1910) on public hearing January 25-27, 1910, authorized by the Chief of Engineers, U. S. Army."

We find in the annual report of the Chief of Engineers for 1910 (p. 1833) a report that a hearing was had in Kansas City, Missouri, January 25 with an adjourned hearing to January 27, 1910, and a report submitted May 20, 1910, with map and description of the harbor lines which lines were finally approved by the War Department June 24, 1910. In none of these maps or documents do we find any order to raise the bridge, hence this allegation remains denied and unproved.

As to the contract it seems that by its terms an agreement was made in 1907 that the present bridge should be deemed lawful and sufficient, subject to the requirement of an additional span on the west bank of the river. The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as de-
45 manded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is

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a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods it must be presumed that its officers are acting in good faith and with sufficient cause and reason and that prima facie, at least, their conclusion as to present requirements is correct. One of the powers of the board repeatedly expressed in the act (Sec. 3006 & Sec. 3009, Gen. Stat. 1909) is to do such things as shall be "conducive to the public health, convenience or welfare," and it is known that the statute was enacted by reason of the flood disasters in 1903 and 1904 with a view to avert their repetition if possible. Among the powers vested in the board are (Sec. 3006)

"To prescribe, regulate and fix the height of the superstructures above the water, * * * to fix, regulate and change the grade or elevation of all public highways, railroads and street railroads at points where any levee may cross or intersect the same. * * * To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course. * * * To do all other acts that may be necessary to carry out and execute the general powers hereinbefore or hereinafter granted, although not hereinbefore specially enumerated."

Being created for the purpose indicated it can not be held that one set of officers can bind themselves or their successors by an agreement like the one in question, for if such could be the case requirements for future conditions would be rendered futile, and conditions agreed upon by one board would have to remain in spite of the desires and conditions possessed and found by a subsequent board. Any person or corporation contracting with the board must be held to do so subject to such subsequent changes in the matters
46 contracted about as subsequent exigencies may require. In its work of clearing the channel of the river and fixing the height of superstructures the board is clearly exercising police power, and it is settled that in such cases a contract by which police power is attempted to be abrogated is ultra vires and void. (State v. St. Paul M. & M. Ry. Co., 108 N. W. 261.)

"The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based." (Northern Pacific Railway v. Duluth, 208 U. S. 583.)

In that case it was said in the opinion, p. 596:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

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On the same page is found a quotation from the decision in New York & New England Railroad Company v. Bristol, 151 U. S. 556:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

It is argued that because the fourth subdivision of this section authorizes the board "to condemn and cause obstructions in such water-courses to be removed" it cannot obtain the relief now
47 prayed for without condemnation and compensation. But the evident meaning of "condemn" as here used is to declare or pronounce a thing to be wrongful, and not to proceed as under the rule of eminent domain to have it appraised.

"Condemn: To pronounce to be wrong; to disapprove of; to censure." (Webster's New Int. Dic. 1911.)

The succeeding clause expressly empowers the board to acquire by "gift, purchase or condemnation" such lands as may be necessary, and it would indeed be an anomaly to speak of condemning an obstruction for the purpose of acquiring title to it.

In answer to the claim of the defendant that it is unlawful for it to change its bridge without approval by the secretary of war under the act of March 3, 1909, plaintiff cites Cummings v. Chicago, 188 U. S. 410 which held that the act of 1899 did not manifest any purpose on the part of Congress to assert power to authorize private persons to erect structures within a navigable water of the United States wholly within the limits of the state, without regard to the wishes upon the concurrent or joint assent of the state and national government. The close of the opinion is as follows:

"The secretary of war acting under the authority conferred by Congress may assent to the erection by private parties of such a structure. Without such assent the structure can not be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

There is nothing in this decision indicating that a bridge across such waters can be lawfully erected or reconstructed until the plans therefor are approved as required by the act of 1899. It is familiar doctrine that when Congress has legislated upon a subject within its power such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded without obtaining the approval of the plans therefor as required by Congress would be to disregard rather than to obey such legislation.

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48 There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and State v. Missouri Pacific Railway Company, 33 Kan. 176 and Burlington, etc., Railroad Company v. People, 77 Pac. 1026 are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper for the reason that the viaducts sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which co-operation could not be compelled. Here the two defendants only are proceeded against, each separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities, is no sufficient reason
49 for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in Balch v. Glenn, 85 Kan. 735 (p. 740):

"Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state."

"Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public" (p.

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743). But in this case the parties are corporations formed for a quasi public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

"All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

"The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the company." (Chicago Burlington, etc., Railroad v. Chicago, 166 U. S. 226.)

"Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

"It is the duty of the railway company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners, under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws." (C. B. & Q. Railway v. Drainage Comm'r's, 200 U. S. 561.)

In the case just cited the court quoted with approval an expression of the supreme court of Illinois that the implied authority of the company to build its present bridge was coupled with the common law duty

"to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use" (p. 587).

In Northern Pacific Railway v. Duluth, 208 U. S. 583 it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such repairs could be required by mandamus. The court said (p. 595):

"We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the State to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement."

"But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety" (p. 598). The Eighth Circuit Court of Appeals in Chicago B. & Q. R. Co. v. Board of Sup'r's, 182 F. 291, held that

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of the unreasonable hostility to the orders of this court or to the welfare of the people comprising the drainage district, and it can not be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs
52 and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas River all obstructions of every kind where their lines cross such stream, the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis directrix.

All the Justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

53 And also on the 28th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a rehearing, which is in the words and figures, as follows, to-wit:

54 Filed May 28, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

18064.

THE KAW VALLEY DRAINAGE DISTRICT WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Samuel W. Moore, O. L. Miller, Cyrus Crane, S. W. Sawyer, Attorneys for Defendant.

55 In the Supreme Court of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Now on this day comes the defendant, Kansas City Southern Railway Company, and moves the court to grant this defendant a rehearing herein, for all the reasons specifically set out in the answer and return of the defendant, and in the brief filed on behalf of the defendant.

We respectfully urge the court to re-examine the law applicable to the case, and especially the authorities contained in our brief, bearing in mind the fact that there has been no hearing of testimony as to the facts involved in the case, and that all of the allegations of fact contained in the alternative writ are denied by the defendant's answer and return. Consequently, the court must take all of the allegations made in the alternative writ to be untrue and all of the statements made in the defendant's answer and return to be true.

So considered, it is difficult for us to comprehend the theory upon which the court could issue a peremptory writ of mandamus.

56 As we have undertaken to advise the Court in our answer and return, and also in our brief, the practical effect of an order such as issued in this case (unless it is made conditional upon prior action being taken by Kansas City, Kansas, and other railroad companies) is to destroy the use of the defendant's line, and prohibit it from carrying on the inter-state commerce for which it was created, and which it is expressly authorized by Act of Congress to do.

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The Act of June 15th, 1866, R. S. 5258, 14 Stat. L. 66, provides:

Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.

The practical effect of the court's decision is to nullify this Act of Congress, and is, we submit, directly contrary to its express provisions.

We earnestly urge that the court, if it cannot see its way clear to refuse the writ entirely (which we think it should do), modify the decision by providing that the writ shall become permanent only after the drainage board has secured from Kansas City, Kansas, and the other railroad companies involved, the necessary permission to disturb their streets and railroad tracks, respectively.

Under the charter of Kansas City, Kansas, it is unlawful for anyone to disturb the streets without the permission of the city, and without certain steps being first taken to determine the dam-
57 ages to property, as provided in Chapter 17, Sections 1020, 1021, 1022, and 1023, General Statutes of Kansas, 1909, p. 235, 236; and section 1290, p. 305.

The effect of the court's decision is to order the defendant to do an unlawful act, on the chance that something may occur in the future, to make it lawful.

Is it not more logical that the court should order the defendant to do the act desired when it shall become lawful, and require the party desiring the defendant to do the act, to take the plain, obvious steps to make that act lawful?

We again urge the court to study carefully the case of State v. Mo. Pacific Railway Company, 33 Kansas, 176, because it is conclusive of this case. The important reason why the writ was refused in that case, was because the ordinance sought to be enforced ignored and contravened the express provisions of the Kansas statutes, in regard to street improvements. It failed to provide the steps required by the statutes before such street improvements could be erected. That is exactly the situation in this case, in view of the provisions of the charter of Kansas City, Kansas, above referred to, and we most earnestly submit that the court cannot make this order permanent (unless it makes it conditional upon the necessary steps being first taken to change the grade of the streets of Kansas City, Kansas, and to determine the damage to abutting property owners) without overruling the case of State v. Mo. Pacific Railway Company, supra.

The fairness and equity of making this modification in the order is so obvious that we cannot believe that the court will refuse to make it. There is no question about its power to make the modification, as it is well settled that the issuance of the writ is largely discretionary with the court, and will not be issued even where

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58 the plaintiff appears to have a legal right, if its issuance will work unnecessary hardship or injustice.

State ex rel. v. Marston, 6 Kansas, 524;
Evans v. Thomas, 32 Kansas, 469;

in which the court says:

Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to be enforced, and then only when they have no other plain and adequate remedy in the ordinary course of law; and only then when justice will be likely to be defeated or frustrated unless a writ of mandamus be allowed. Also, courts of justice may often exercise a considerable degree of discretion in allowing or refusing writs of mandamus. (State v. Marston, 6 Kas., 524, 537, and cases there cited; A. T. & S. F. Rld. Co. v. Jefferson Co., 12 Id., 136; Golden v. Elliott, 13 Id., 92; The State v. Breese, 15 Id., 125; The State v. Comm'rs of Anderson Co., 28 Id., 70.) Courts of justice may always refuse such writs where their issuance would tend to thwart the administration of justice, instead of contributing to its promotion.

Potwin Place v. Railroad, 51 Kans., 609;
Merrill on Mandamus, Sec. 64, 67;
Spelling Injunction and Ex. Remedies, Sec. 1371;
High Extraordinary Legal Remedies (3 Ed.) Sec. 9;
In Re Key, 189 U. S., 84;
Railroad v. Hall, 91 U. S., 343, 356;
People v. Olson, 74 N. E., 785 (Ill.);
State v. Cottengin, 172 Mo., 129, 134;
State v. Bridge Co., 206 Mo., 74.

SAMUEL W. MOORE,
O. L. MILLER,
CYRUS CRANE,
S. W. SAWYER,
Attorneys for Defendant.

59 And afterward and on the 14th day of June, 1912, the same being one of the regular Judicial Days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and made of record, in words and figures as follows, to-wit:

60 In the Supreme Court of the State of Kansas.

FRIDAY, *June* 14, 1912.

18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered that said petition for a rehearing be denied.

61 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a writ of error, in the words and figures as follows, to-wit:

62 Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Kansas, ss:

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Kansas:

The petition of The Kansas City Southern Railway Company respectfully shows: That on the 11th day of May, A. D. 1912, the Supreme Court of the State of Kansas made and entered a final order and judgment herein against your petitioner, The Kansas City Southern Railway Company in a cause wherein the Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff and The Kansas City Southern Railway was defendant, in which

final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner in that it deprived your petitioner of rights, titles, privileges and immunities guaranteed it by the Constitution of the United States, because it upholds the validity of a statute of the State of Kansas (Article 3, Chapter 34, General Statutes of Kansas, 1909, p. 661,) and authority exercised thereunder by the Kaw Valley Drainage District of Wyandotte County, Kansas, which is repugnant to Section 1 of the Fourteenth Amendment, Section 8, Article 1, and Section 10, Article 1, of the Constitution of the United States, and to the Act of Congress of the United States of March 3, 1899, (Chapter 425, Section 9; 30 Statutes at Large of U. S.,
63 p. 1151), and to the Act of Congress of the United States of June 15th, 1866 (R. S. Sec. 5258, 14 Stat. L. 66), all of which will more in detail appear from the assignments of error which are filed with this petition.

That the said supreme court of the state of Kansas is the highest court of the said state of Kansas in which a decision in this suit and this matter could be had.

That a reference to the record had in the trial and proceedings in said cause will show that your petitioner has properly preserved and raised those constitutional and statutory rights upon which it relies.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for citation and supersedeas.

Dated this 18th day of June, A. D. 1912.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By S. W. MOORE,
O. L. MILLER &
CYRUS CRANE, *Its Attorneys.*

Let the Writ of Error issue as prayed June —, 1912.

———,
Chief Justice of the Supreme Court of the State of Kansas.

64 [Endorsed:] 18064. Kan. City Southern Ry. Co. vs. Kaw Valley Drainage District of Wyandotte Co., Kan. Petition for Writ of Error. Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

65 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the assignments of errors, which are in the words and figures as follows, to-wit:

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66 In the Supreme Court of the State of Kansas.

No. —.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignments of Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are in conflict with and in violation of the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the State of Kansas, by and through the provisions of the said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privileges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kansas the equal protection of the laws.

67 2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities, secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the law.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be

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exercised thereunder, are not in violation of section 8, Article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce, among the several states.

7. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the act of Congress of the United States of March 3, 1889, (Chap. 425, sec. 9; 30 Statutes at Large, page 115) yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said act of Congress.

68 8. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not in violation of the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

9. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge, without any hearing or opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff in error having been given any opportunity to present a defense or to be heard upon the facts, is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law.

11. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by section 1 of the Four-

69 teenth Amendment to the Constitution of the United States.

12. The action of the Supreme Court of Kansas in this case is repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large, 1151), in that no plans for the changing or raising of the plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

13. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said act in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge

all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportaion of same to the places of destination, and the court erred and denied to the plaintiff in error the rights, privileges and immunities guaranteed to it by said act in refusing to so hold.

70 15. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

16. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large 1151), in that no plans for the raising or changing of the plaintiff in error's bridge as ordered by the Supreme Court of Kansas have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

17. The court erred in holding that the alleged action of the defendant in error in regard to the plaintiff in error's bridge is not rejugnant to the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

18. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law, and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

19. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that
71 it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

20. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution

of the United States, and particularly in section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of pactice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error, but facts which were entirely outside of the
72 record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas, and contrary to the rights accorded other litigants.

Wherefore plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

S. W. MOORE,
O. L. MILLER,
CYRUS CRANE,
Attorneys for Plaintiff in Error.

73 [Endorsed:] 18064. Kan. City Southern Ry. Co. v. The Kaw Valley Drainage District of Wyandotte Co., Kansas. Assignment of Errors. Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

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74 And afterward and on the 25th day of June, 1912, the same being one of the regular judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among others was had, and made of record, as follows, to-wit:

75 In the Supreme Court of the State of Kansas.

18064.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Defendant,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

And now on this 25th day of June, 1912, comes O. L. Miller and S. W. Sawyer, attorneys for the above named defendant and presents to the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, their petition for the allowance of a writ of error herein for the purpose of perfecting an appeal to the United States Supreme Court; and also comes L. W. Keplinger, attorney for the plaintiff and opposes the allowance of said petition. And thereupon, and after due consideration it is ordered, that the application for a writ of error be denied, for the reason that no federal question is involved. And thereupon the attorneys for the defendant except to the ruling denying said application, and said exception is allowed.

W. A. JOHNSTON,
Chief Justice, Supreme Court of the State of Kansas.

76 In the Supreme Court of the State of Kansas.

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct and complete transcript of the pleadings and papers filed, and of all proceedings had, in said court in above entitled cause, as the same remain on file and of record in my office.

Witness my hand, and the seal of the Supreme Court of the State of Kansas affixed hereto, at my office in the City of Topeka this 27th day of June, 1912.

[Seal Supreme Court, State of Kansas].

D. A. VALENTINE,
Clerk Supreme Court.

77 Here follows the Original Petition for a Writ of Error, the Assignments of Errors and Prayer for Reversal, the Writ of Error, the Citation and proof of service thereof, and a copy of the Bond.

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78 *Petition for Writ of Error.*

To the Honorable Willis Van DeVanter, Associate Justice of the Supreme Court of the United States:

The petition of The Kansas City Southern Railway Company, a corporation of the State of Missouri, respectfully shows:

That heretofore, on the 9th day of February, 1912, there was instituted in the Supreme Court of the State of Kansas, by The Kaw Valley Drainage District of Wyandotte County, Kansas, a public corporation, organized under the laws of the State of Kansas, an original proceeding in mandamus, by which the said Kaw Valley Drainage District of Wyandotte County, Kansas, prayed a writ to compel your petitioner to raise a certain bridge across the Kansas, or Kaw, River, which it was alleged that your petitioner owns, six and five tenths (6.5) feet above its present height.

The petition of the plaintiff and the alternative writ alleged that the plaintiff, under the authority of the laws of the State of Kansas, did order direct that said bridge be so raised.

Thereafter, your petitioner filed its return to the alternative writ, which was issued by the Supreme Court of the State of Kansas, denying all of the allegations in the plaintiff's petition, and in the alternative writ, except the fact that the plaintiff was a public corporation; that the defendant was a railway corporation; that the Kansas River flows through the Kaw Valley Drainage District, and that your petitioner owns a bridge across said River.

In said return your petitioner also showed that the order and direction of the plaintiff, if enforced, was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States; to Section 8 of Article I of the Constitution of the United States; and to Section 10 of Article I of the Constitution of the United States; and to the Act of Congress of the United States, of June 15th, 1886 (R. S. 5258; 14 Stat. L. 66); to the Act of Congress of the United States of March 3, 1899 (Chapter 425,
79 Section 9; 30 Stat. L. 1151) and that it would deprive your petitioner of rights, privileges and immunities under such provisions of the Constitution of the United States and under the Statutes and laws of the United States, and particularly under said Statutes of the United States above referred to; all of which will more particularly appear in the record and proceedings in said Supreme Court of the State of Kansas, and in the Assignment of Errors filed herewith.

That thereafter, on or about the 11th day of May, A. D. 1912, the Supreme Court of the State of Kansas made and entered a final judgment and order in said cause against your petitioner, requiring, ordering and directing that your petitioner remove its bridge from said River, together with all abutments and piers belonging thereto. In effect the Court held that it could not, without violating the said Act of Congress of March 3rd, 1899, order the plaintiff in error's bridge to be reconstructed and raised as prayed by the defendant in error, but attempted to avoid the effect of said Act of Congress by ordering and directing that the plaintiff in error do what was not prayed by the defendant in error, nor set out in the alternative

writ in said cause—that is, to remove and entirely destroy the plaintiff in error's bridge, with all its piers and abutments. The effect of this decision is not only directly contrary to said act of Congress of March 3rd, 1899, but also would result in the utter destruction of the plaintiff in error's line of railway, and would deprive it of its property without due process of law, and disable it from carrying on its business of interstate transporation, as it is authorized to do by the Act of Congress of June 15th, 1886. That the effect of said decision is an attempt on the part of the State of Kansas to declare a structure made lawful by the laws of the United States to be unlawful, without any concurrent action by Congress or the properly constituted authorities of the United States.

That in said final order and judgment, and the proceedings had thereunto in said cause, certain errors were committed, to the prejudice of your petitioner, in that your petitioner was deprived
80 of certain rights, titles, priveleges and immunities guaranteed to it under the Constitution and laws of the United States, and in that an authority exercised under the State of Kansas, which was and is repugnent to the Constitution and laws of the United States, was enforced and held valid by said Supreme Court of the State of Kansas; all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

That the said Supreme Court of the State of Kansas is the highest Court in said State of Kansas in which a decision in this suit and this matter could be had.

That a reference to the record had in the trial and proceedings of said cause, will show that your petitioner has properly preserved and raised those federal questions and rights upon which it relies.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for a citation and supersedeas.

Dated this 1st day of July, 1912.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By SAMUEL W. MOORE,
CYRUS CRANE,
O. L. MILLER,
ALDIS B. BROWNE,
Its Attorneys and Counsel.

Let the writ of error issue as prayed this July 5th, 1912.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States

81 The Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignments of Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the State of Kansas, by and through the provisions of said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privileges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kansas the equal protection of the laws.

82 2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder, and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities, secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the law.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in violation of section 8, article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce among the several states.

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7. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the act of Congress of the United States of March 3, 1899 (Chap. 425, sec. 9; 30 Statutes at Large, page 115), yet the court in its decision orders indirectly that which it admits it could not order
83 directly except in violation of the said act of Congress.

8. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not in violation of the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

9. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge, without any hearing or opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff in error having been given any opportunity to present a defense or to be heard upon the facts, is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law.

11. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the
84 Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by section 1 of the Fourteenth Amendment to the Constitution of the United States.

12. The action of the Supreme Court of Kansas in this case is repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large, 1151), in that no plans for the changing or raising of the plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

13. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said act in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as

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to form continuous lines for the transportation of same to the places of destination.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of June 15, 1866 (R. S. sec. 5258, 14 Statutes at Large 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination, and
85 the court erred and denied to the plaintiff in error the rights, privileges and immunities guaranteed to it by said act in refusing to so hold.

15. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

16. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not repugnant to the act of Congress of the United States of March 3, 1899 (chap. 425, sec. 9; 30 Statutes at Large 1151), in that no plans for the raising or changing of the plaintiff in error's bridge as ordered by the Supreme Court of Kansas have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or any one else.

17. The court erred in holding that the alleged action of the defendant in error in regard to the plaintiff in error's bridge is not repugnant to the act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

18. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprives the plaintiff in error of its property without due process of law, and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

86 19. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

20. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it de-

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prives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by the plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the
87 defendant in error, but facts which were entirely outside of the record in the case, contrary to the uniform practice and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas, and contrary to the rights accorded other litigants.

Wherefore plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,
By SAMUEL W. MOORE,
CYRUS CRANE,
ALDIS B. BROWNE,
O. L. MILLER,
Attorneys for Plaintiff in Error.

88 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Kaw Valley Drainage District of Wyandotte County, Kansas, plaintiff, and The Kansas City Southern Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in ques-

89 tion the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, The Kansas City Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

July 5, 1912.

Allowed *by* and to operate as a supersedeas.
WILLIS VAN DEVANTER,
Associate Justice of the Supreme
Court of the United States.

COPY BOUND

90 UNITED STATES OF AMERICA, *ss:*

To The Kaw Valley Drainage District of Wyandotte County, Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Kansas, wherein The Kansas City Southern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

91 On this 9th day of July, in the year of our Lord one thousand nine hundred and twelve, personally appeared Clarence R. Hall before me, the subscriber, and makes oath that he delivered a true copy of the within citation to C. W. Trickett, one of the Attorneys for defendant in error.

CLARENCE R. HALL.

Sworn to and subscribed the 9th day of July, A. D. 1912.

[Seal Charles A. Peabody, Notary Public, Jackson Co., Missouri.]

CHARLES A. PEABODY,
Notary Public in and for Jackson County, Missouri.

My Commission Expires June 4, 1914.

92 In the Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Bond.

Know all men by these presents: That we, The Kansas City Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, as principal, and National Surety Company, a corporation organized and existing under and by virtue of the laws of New York, as surety, are held and firmly bound unto The Kaw Valley Drainage District of Wyandotte

County, Kansas, in the sum of One Hundred Thousand Dollars ($100,000) to be paid to the said obligee, to the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of July, A. D. 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error in the Supreme Court of the United States, to reverse the judgment and decree rendered against it by the Supreme Court of the State of Kansas, in a proceeding wherein The Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff, and The Kansas City Southern Railway Company, was defendant;

93 Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[Seal K. C. S. Ry. Co.]

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By H. VISSCHER, *Its Treasurer,*
NATIONAL SURETY COMPANY,
By P. O. DRAPER, AND
W. H. CLASUM,
Attorneys-in-Fact.

[Nat'l Sur. Co. Seal.]

Attest:
R. J. McCARTY,
Assistant Secretary.

July 5, 1912.

Bond approved and to operate as supersedeas.
WILLIS VAN DEVANTER,
Justice of the Supreme Court of the United States.

94 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of said court, do hereby certify that there was lodged with me as such clerk on July 10, 1912, in the matter of The Kansas City Southern Railway Company versus The Kaw Valley Drainage District of Wyandotte County, Kansas,

1. The original Bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony wheerof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 18th day of July, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

COPY BOUND C

95 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 18th day of July, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

Endorsed on cover: File No. 23,309. Kansas Supreme Court. Term No. 313. The Kansas City Southern Railway Company, plaintiff in error, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas. Filed July 27th, 1912. File No. 23,309.

LOSE IN CENTER

FILED
MAR 11 1914
JAMES D. MAHER

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 313

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
Attorneys for Plaintiff in Error.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 313.

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This case is here on writ of error to the Supreme Court of the State of Kansas, the opinion of that court being reported in 87 Kan. 272, 123 Pac. 991.

On February 9th, 1912, the Kaw Valley Drainage District of Wyandotte County, Kansas, hereinafter referred to as plaintiff, filed a petition in the Supreme Court of Kansas for a writ

of mandamus against The Kansas City Southern Railway Company, hereinafter referred to as defendant, to compel defendant to elevate its railroad bridge across the Kansas river at Kansas City to a prescribed height. Thereupon an alternative writ of mandamus was issued by the court.

Defendant duly filed its return and answer to the alternative writ. Plaintiff filed a reply to this answer, but afterwards withdrew it and moved for judgment upon the pleadings. This motion was granted and the case was heard merely on briefs and oral argument, no testimony whatever being taken. Since the whole controversy is presented by the pleadings, we feel it will not be out of place to set them out rather fully at this time.

The affidavit and motion upon which the writ issued is as follows, the caption being omitted (Record, pp. 1, 8):

Affidavit and Motion for a Writ of Mandamus.

Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the court:

That the plaintiff, The Kaw Valley Drainage District of Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant The Kansas City Southern Railway Company is a corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the Statutes of the State of Kansas the plaintiff herein was given authority to determine the height of the lowest point of the super-

structure of all bridges across the said Kansas river within said district, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas river within the Drainage District which is usually termed "the Ohio bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore, plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above St. Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

The citation with which the alternative writ concluded is as follows (Record, p. 10):

Now therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Ohio avenue bridge over the Kansas river 6.5 feet or so that the lowest point of superstructure will be 340.26 feet above St. Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at 2 o'clock p. m. of said day and show cause by answer filed herein why you will not do so and have you then and there this

writ with your return thereon showing that you have complied with or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon this writ and answer is hereby set for the — day of February, 1912.

The verified return and answer of defendant to the alternative writ is as follows, formal parts being omitted (Record, p. 5):

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein, says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the state of Missouri, and is a resident and citizen of said state of Missouri and not a resident or citizen of the state of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the state of Missouri and from states other than Kansas to and into Wyandotte county and state of Kansas, and from Wyandotte county in the state of Kansas to the state of Missouri and to states other than the state of Kansas.

That the defendant's railway tracks extend from Jackson county, state of Missouri, into and through

Wyandotte county and state of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the state of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various Acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the state of Missouri extend to and into Wyandotte county, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas river 6.5 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas river since it will be unable to either go on to or off said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks

upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total

destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1, Article 14, of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

Defendant was subsequently allowed to amend this return and answer as shown on page 13 of the Record. One of these amendments was the following, to be inserted at the conclusion of the paragraph alleging that the action of plaintiff was unreasonable, illegal and arbitrary:

"And in violation of the Fourteenth Amendment to the Constitution of the United States."

The following is one of the amendments to be inserted immediately preceding the prayer:

"That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans for rebuilding the bridge in question and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal officials."

The case was heard along with a similar one instituted by plaintiff at the same time against the Kansas City Terminal

Railway Company, now pending in this Court as No. 314, and one judgment was rendered in both cases as follows (Record, p. 16):

> This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the St. Louis directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 feet above the St. Louis directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $————, and hereof let execution issue.

Defendant's motion for a rehearing was overruled (Record, p. 29) and its petition for a writ of error from this Court was denied (Record, p. 35). The writ of error, with supersedeas, was allowed by Mr. Justice Van Devanter.

A motion to dismiss filed by plaintiff in this Court was overruled. We shall not attempt to argue the question of jurisdiction as an independent proposition. If it can be regarded as still in the case it will be sufficiently presented in the course of our argument of issues raised by the assignments of error.

SPECIFICATION OF ERRORS.

The defendant selects the following from the various assignments of error (Record, pp. 38-41), and specifies them as errors of the Supreme Court of Kansas relied upon herein:

1. **The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws, in these respects, to-wit:**

(a) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(b) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(c) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error, but facts which were entirely outside of the record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(d) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the de-

struction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing, and without compliance with the forms of law, or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(e) The decision of the Supreme Court of Kansas, while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the state of Kansas, and contrary to the rights accorded other litigants.

2. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court, and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff in error the rights, privileges and immunities guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The court erred in that, while it appeared that the authority sought to be exercised under the said Act (G. S. Kansas 1909, Art. 3, ch. 34) in this case was repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large, page 1151), yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said Act of Congress.

4. The decision of the Supreme Court of Kansas in this case is repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large 1151), in that no plans for the changing or raising of plaintiff in error's bridge, as ordered by the Supreme Court of Kansas, have been approved by the Chief of Engineers or the Secretary of War, either upon the application of the defendant in error or anyone else.

5. The decision of the court is repugnant to the Act of Congress of the United States of June 15, 1866 (R. S., Sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said Act, in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

6. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

7. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law, and of the equal protection of the laws, in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

8. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

9. The court erred in holding that the authority sought to be exercised by defendant in error under the said Act is not in violation of Section 8, Article 1, of the Constitution of the United States which confers upon Congress the exclusive power to regulate commerce among the several states.

BRIEF.

It will be noted from the foregoing statement of facts that defendant's answer to the alternative writ did not attack the validity of the Drainage Act of Kansas (L. 1905, Ch. 215; G. S. 1909, Art. 3, Ch. 34), under which this proceeding arose; it confined its attack to the validity of the action sought to be taken by plaintiff thereunder. So in this Court the validity of that Act cannot and will not be raised; our brief will be confined to matters properly raised upon the assignments of error—the validity of the action of plaintiff and of the Supreme Court of Kansas, as instrumentalities of the state, in attempting to exercise the powers and authority granted by its laws.

I.

The proceedings in the Supreme Court of Kansas upon which judgment was rendered in this case operate as a denial to defendant of the equal protection of the laws and as a deprivation of its property without due process of law.

The above proposition, it is to be noted, has no reference to the effect of the judgment of the Supreme Court of Kansas in this case. That will be attacked later. What is complained of here is simply the method pursued by the court in arriving at its decision.

That the prohibitions of the Fourteenth Amendment refer to and control all branches of the state government, legislative, executive and judicial, is so well settled at this late date as hardly to merit assertion. *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; *Blake* v. *McClung*, 172 U. S. 239, 260; *Scott* v. *McNeal*, 154 U. S. 34, 35; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Ex parte Virginia*, 100 U. S. 339, 346.

In *Chicago, B. & Q. R. Co.* v. *Chicago, supra*, Mr. Justice Harlan says in the opinion, page 233:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or, as we have often said, the constitutional prohibition has no meaning and the state has clothed one of its agents with power to annul or evade it."

While the line of demarcation between the two conceptions, "equal protection of the laws" and "due process of law," is not always clearly defined and the two frequently overlap, yet in the present instance we rest our contentions with reference to them on wholly different and distinct considerations and shall treat of each contention separately.

1. *The method of procedure followed by the Supreme Court of Kansas in this case was in violation of the laws of that state regulating the practice in such cases, was different from that which would or could be lawfully applied to any other person in the state in a similar case, and denied to defendant the equal protection of the laws.*

In *Tinsley* v. *Anderson*, 171 U. S. 101, this Court in overruling the contention that a certain procedure in a state court denied to defendant the equal protection of the laws, said, page 106:

> "The right to the equal protection of the laws was certainly not denied, for it is apparent that *the same law or course of procedure* which was applied to Tinsley *would have been applied to any other person in the state of Texas, under similar circumstances and conditions;* and there is nothing in the record on which to base an inference to the contrary."

Similar statements are to be found in *Minder* v. *Georgia*, 183 U. S. 559, and in *Andrus* v. *Insurance Assn.*, 168 Mo. 151, 162.

The converse of the proposition stated in the above cases would seem necessarily to follow, and is, in fact, laid down as the rule in *Ex parte Stricker*, 109 Fed. 145, 150:

> "The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not and could not lawfully be applied to any other person in the state under similar circumstances."

Section 6318 of the Revised Statutes of Kansas of 1909 provided with reference to the procedure to be followed in mandamus proceedings:

> "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, and are to be construed, and may be amended, in the same manner as pleadings in a civil action; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

In the case of *Crans* v. *Frances*, 24 Kan. 750, Mr. Justice Brewer, in commenting upon the effect of the statutory provisions, said:

> "The entire nature of this proceeding (mandamus) is, as we have had occasion heretofore to notice, changed by statute. It is now, in its form, very like an ordinary action. No other pleadings are allowed than the writ and answer. These pleadings are to be construed, and to have the same effect, as proceedings in a civil action; and the issues are to be tried, and further proceedings had, as in a civil action."

In the present case all of the material allegations in the alternative writ stood denied by defendant's answer. Can it be doubted that in any other civil action, or in any other mandamus suit, plaintiff would have been required to support them by some proof before it would be awarded the final relief prayed for?

In the present case defendant's answer, by its affirmative allegations, raised several issues of fact, one of which was as

to whether there was a reasonable necessity for the demand of plaintiff that it elevate its bridge, or whether that demand was unreasonable and arbitrary. Can it be doubted that in any other civil action, or in any other mandamus suit, the court would have permitted the defendant to offer evidence in substantiation of such allegations, instead of taking as true the contrary and controverted allegations of the plaintiff?

It should be emphasized right here that the court did not hold that the defenses set up by defendant, if true, would not in law be sufficient to defeat the action; if it had so held, then there would doubtless be no force in our contention that its method of procedure denied defendant the equal protection of the laws, however vulnerable its judgment might be on other grounds. The fact is, the court absolutely ignored this defense in the case of this defendant, not even mentioning it in summarizing the contents of its answer in the beginning of the opinion. The only place in the opinion where any reference is made to the validity of such a defense is where it is discussed with reference to the companion case decided at the same time (Record, page 20):

> "The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as demanded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods, it must be presumed that its officers are acting in good faith and with sufficient cause and reason, and that *prima facie*, at least, their conclusion as to present requirements is correct."

The case is not helped if the above may be taken as applying equally to the answer of this defendant. Whether or not the court erred in holding, in the absence of a statute so providing, that in a suit brought to enforce its own orders plaintiff would be presumed to be acting within reason and in good faith, it is not necessary to discuss here. That could not obviate the necessity of giving defendant the opportunity to

overcome this presumption by proof. It could only operate to shift the burden of proof to defendant.

The laws of Kansas make the orders of its Railroad Commission *prima facie* reasonable in all proceedings brought in the courts to enforce them. This, however, is not sufficient to prevent defendant from setting up in its answer in the Supreme Court to an alternative writ of mandamus issued therefrom that, as a matter of fact, a particular order of the Commission which is sought to be enforced is arbitrary and unreasonable; and is not sufficient to prevent defendant from obtaining an inquiry into the issue of fact thus raised. This much, at least, is to be gathered from the decision of the Kansas court in the case of *State* v. *Mo. P. R. Co.*, 92 Pac. 606, which was affirmed by this Court in *Mo. P. R. Co.* v. *State*, 216 U. S. 262.

Again, the citation in the alternative writ commanded defendant to raise its bridge to a certain elevation or appear on a certain day and show cause why it would not do so. Defendant chose the latter alternative, made its appearance and gave as one reason why its bridge could not be raised the fact that this could not be done without the consent of the chief of engineers and the Secretary of War of the United States, which had not been gained (Record, p. 14). This the court itself, in its opinion, held to be an insuperable obstacle to the enforcement of the command of the writ (Record, p. 22):

> "It is a familiar doctrine that when Congress has legislated upon a subject within its power, such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded without obtaining the approval of the plans therefor as required by Congress would be to disregard rather than to obey such legislation."

In spite of this holding, however, the court proceeded to enter a final order commanding defendant to do an entirely different thing, something not mentioned in the citation, something about which defendant was given no notice and concern-

ing which it had no opportunity to be heard. Defendant was ordered to remove its bridge absolutely, not merely to elevate it. Is it imaginable that such a course of procedure would have been applied to any other person in the state of Kansas in any other civil action, or in any other mandamus proceeding?

This case was set down by the court for argument on the pleadings. It is said in the opinion (Record, p. 18):

> "The plaintiff withdrew its reply and moved for judgment on the pleadings, and although in the brief there is a long detailed statement of alleged facts, we can only consider the case upon the allegations contained in the writ and in the answer and return."

In spite of this fact, however, it appears from the court's opinion (Record, p. 20) that plaintiff submitted certain documentary evidence in support of the allegations of the alternative writ and that the court gave careful consideration to this evidence. Will it be pretended that such a course of procedure would have been followed in any other similar case?

It would thus appear unnecessary to go further in an effort to show that *the method of procedure we here criticise was one which never has been and never could be lawfully applied to any other person in Kansas in a similar case*, and that it denied to defendant the equal protection of the laws within the meaning of the prohibition contained in the first paragraph of the 14th Amendment.

2. *The method of procedure adopted by the Supreme Court of Kansas in this case violated fundamental rights secured to defendant by the law of the land, and operates to deprive it of its property without due process of law.*

The foregoing argument with reference to a denial of equal protection of the laws was predicated upon the fact that the procedure complained of was contrary to the laws of Kansas. Our argument under the present head will have no reference to what those laws may or may not have authorized; it will be our contention here that the procedure followed by the Kansas court in this case was one which could not have

been authorized by the state, even though its constitution expressly provided for it. This is what has been laid down by this Court as the test when it is claimed that the method of procedure in a state court has operated to deprive a party of his property without due process of law. It is said in *Rawlins* v. *Georgia*, 201 U. S. 638, 640:

> "If the state constitution and laws as construed by the state court are consistent with the Fourteenth Amendment, we can go no further. The only question for us is, whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."

It can make no difference for the purpose of our argument here whether the procedure adopted by the Kansas court was one authorized by the laws of the state or one merely arbitrarily adopted by the court for this particular case, for, as we have already seen, the 14th Amendment controls the judicial no less than the legislative branch of the state government.

We quote from the opinion of this Court in the case of *Hovey* v. *Elliott*, 167 U. S. 409, 417:

> "How can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the constitution?"

However careful this Court has been in the past to avoid an attempt at precise definition of "due process of law," always preferring the wiser course of working out its full intent and application "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded" (*Davidson* v. *New Orleans*, 96 U. S. 97), still a mere cursory glance at its decisions will reveal that it has never hesitated to include the presence of notice and hearing as a fundamental and essential element, if not, indeed, as constituting the very essence of "due process." This is one of the fundamental conceptions of the phrase embodied in Mr. Webster's famous

definition, although it would seem that the idea was by no means original with that great advocate. We find in the opinion by Fortescue, J., in *Rex* v. *Cambridge University*, 1 Stra. 558, 567:

> "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam, before he was called upon to make his defense. Adam (says God), where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

The decisions of this Court in which the same principle has been announced are almost too numerous to mention. We shall merely cite: *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Hovey* v. *Elliott*, 167 U. S. 409, 414; *Holden* v. *Hardy*, 169 U. S. 366, 389.

In *Londoner* v. *Denver*, 210 U. S. 373, the court points out that in the assessment, apportionment and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. Yet even in this exercise of its governmental powers by the state, the court holds, page 385:

> "Due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice either personal, by publication, or by a law fixing the time and place of the hearing."

We desire it distinctly understood that we are not here attacking, *sub nomine*, the action by which plaintiff sought to procure the enforcement of its orders; that is, we are not contending that *mandamus* was an improper remedy because defendant was entitled to have the issues of fact raised by the pleadings tried before a jury. Nothing of that sort is in mind.

We are aware of the principle laid down by this Court many times and expressed as follows in *Hooker* v. *Los Angeles*, 188 U. S. 314, 318:

> "The Fourteenth Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, *if the method adopted gives reasonable notice and affords a fair opportunity to be heard.*"

It is exactly on the ground expressed in the words which we have italicized in the above quotation that we assail the method of procedure applied by the Kansas court in this case. Our contention is that *it did not give reasonable notice and a fair opportunity to be heard;* that it was neither suitable nor admissible in a case such as this, where a person is being deprived of his property under the guise of a police regulation of the state.

Mr. Justice Bradley said in *Davidson* v. *New Orleans*, 96 U. S. 97, 107:

> "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property, and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

It is to be noted that the Kansas Act (L. 1905, Ch. 215; G. S. 1909, Art. 3, Ch. 34), from which the plaintiff derives its authority, makes no provision whatever for notice and hearing as a prerequisite to the exercise by plaintiff of its power "to condemn and cause obstructions in such water courses to be removed" and "to prescribe, regulate and fix the height of the superstructures above the water, the length of all spans and

the location of the piers of all bridges across water courses situated in the district." The only possible theory, then, upon which the Act could be held valid is that the person interested may always secure a hearing by contesting the validity of any order of the Drainage Board in the courts. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418. The Act nowhere attempts to make the findings of the Drainage Board conclusive on the courts, and the court in this case did not pretend to put any such construction upon its provisions.

It appears from the pleadings that the plaintiff did not give defendant any opportunity to be heard before determining upon the alleged necessity of making the change demanded in defendant's bridge. The question here is solely whether or not a fair opportunity of being heard was accorded defendant by the Kansas court. This may be determined, we think, by considering its treatment of only one of the issues raised by defendant's answer, that of the reasonableness of plaintiff's demands.

In *Mo. P. R. Co.* v. *Nebraska*, 217 U. S. 196, this Court said in its opinion, page 206:

> "It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads, after all, are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

One of these limitations upon the exercise by the state of its police power, through any of its instrumentalities, is that *its action must be reasonable and not arbitrary*, and whether or not it is so in any case where its validity is properly challenged on this ground *is always a question of fact to be inquired into by the court* and determined in the light of all the circumstances. *Chicago, B. & Q. R. Co.* v. *Ill.*, 200 U. S. 561; *Washington* v. *Fairchild*, 224 U. S. 510; *Chicago, B. & Q. R.*

Co. v. *Chicago*, 166 U. S. 226; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 235, 239; *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Lawton* v. *Steele*, 152 U. S. 133; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Yates* v. *Milwaukee*, 10 Wall. 497.

This Court said in *Chicago, B. & Q. R. Co.* v. *Illinois*, *supra*, page 592:

> "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320."

And in *Lawton* v. *Steele*, *supra*, it is said on page 137:

> "The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is the proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

It can make no difference in the present case that the police power is here ostensibly invoked in behalf of the public safety, for this power is the same and is subject to the same tests for its validity whether invoked for the protection of the public health, safety and morals, or merely the advancement of the general convenience and well-being of the community. *L. S. & M. S. R. Co.* v. *Ohio*, 173 U. S. 285; *Bacon* v. *Walker*, 204 U. S. 311; *C. B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592; *Manigault* v. *Springs*, 199 U. S. 473; *License Cases*, 5 How. 504, 583.

The court said in *L. S. & M. S. R. Co.* v. *Ohio, supra,* on page 300 of the opinion:

> "Consistently with these doctrines it cannot be adjudged that the Ohio statute is uncontstitutional. The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety. Whether legislation of either kind is inconsistent with any power granted to the general government is to be determined by the same rules."

In the present case defendant's answer denied that there was any reasonable necessity for the action sought to be enforced by plaintiff, as alleged in the alternative writ, but asserted that on the contrary, plaintiff's demand that it elevate its bridge was *unreasonable* and *arbitrary* and that its enforcement would deprive defendant of its property without due process of law and deny it the equal protection of the laws. No exception was taken by motion or otherwise to the sufficiency of the answer to raise this issue, and the opinion of the Kansas court herein makes no point in this regard.

To say that the mere permission to argue the case orally and to file a brief herein, which is all that was granted defendant, amounted to a hearing within the meaning of that term as used by the courts when giving it as an essential element in "due process of law," is absolutely to disregard the substance and lean upon the mere form of the word. As this Court said in *Washington* v. *Fairchild,* 224 U. S. 510, 524, speaking of a contention made against a statute of Oregon that it was invalid because it did not provide for notice and hearing:

> "If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to

listen, but to give legal effect to what has been established."

And in *Fayerweather* v. *Ritch*, 195 U. S. 276, this Court said on page 299:

"Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U. S. *supra*." (*Chicago, B. & Q. R. Co.* v. *Chicago.*)

As pointed out in our preceding argument, there was no determination of this issue raised by defendant's answer; the court absolutely ignored it both in its statement of the pleadings and in its decision of the case. This was an issue properly before the court on the pleadings; due process would require that it be determined before judgment could be rendered.

As said in the case quoted from last above, page 301:

"The state court was one of competent jurisdiction, and the present contestants were before that court, taking part in the litigation. The validity of the releases was put in issue by the pleadings, and no judgment could properly have been rendered without a determination of that question."

The action of the court in its treatment of this issue was as though it had struck down defendant's answer of its own accord and proceeded to judgment as on confession. Defendant here was not even in contempt of the court as was the case in *Hovey* v. *Elliott*, *supra*, yet this Court refused to sanction any such procedure in that case, saying, page 446:

"There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his

defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."

Defendant here was not even an alien enemy as was the case in *Windsor* v. *McVeigh*, 93 U. S. 274, and *McVeigh* v. *U. S.*, 11 Wall. 267, yet this Court, in the strongest terms, condemned such a method of procedure in those cases, saying in its opinion in the former, page 277:

> "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

We have said that the necessary element of notice also was lacking in the form of procedure adopted by the Supreme Court of Kansas. This is absolutely apparent when we consider the variance between the citation of the alternative writ and the final order of the court, as pointed out in our preceding discussion of this feature.

Going back to the test with which we started out in our argument upon this phase of the case, is it conceivable that a state could authorize the course of procedure adopted in this case, even though that course were specifically authorized by its Constitution? Could a state authorize a procedure by which a person being haled into court to show cause why he should not be deprived of his property is yet not permitted to prove the existence of facts which present an unquestioned reason why his property should not be taken? Or could a state authorize a procedure under which a party has been notified to appear in court and show cause why he should not be

required to do a certain act, and then, after he has shown to the satisfaction of the court why he cannot lawfully be required so to do, nevertheless, without further notice and without opportunity to be heard further, is ordered by the court to do a wholly different thing?

Unless the above questions can be answered in the affirmative, then the method of procedure followed by the Kansas court in the present case, whatever kind of process it may have been, was not "due process of law" within the meaning of that term as heretofore construed by this Court.

II.

If the procedure adopted by the Supreme Court of Kansas in this case is not sufficient to invalidate its judgment herein for the reasons stated in the preceding argument, then that judgment is still invalid, because in itself it deprives defendant of its property without due process of law.

Should this Court fail to sustain our contention made under the preceding proposition, as to the invalidity of the method of procedure by which the Kansas court arrived at its decision in this case, that determination can only be fatal to the validity of the judgment rendered by that court herein. From our standpoint, it can make no difference whether the invalidity may be held to inhere in the method pursued or in the result attained. We quote from the opinion in the case of *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And again on page 234 it is said:

> "Nor is the contention that the railroad company has been deprived of its property without due process of law

entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *United States* v. *Cruikshank*, 92 U. S. 542, 544; *Leeper* v. *Texas*, 139 U. S. 462, 468. But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

To hold that the procedure followed by the Kansas court in this case was lawful, is necessarily to hold that the court did give full consideration to all issues raised by defendant's answer, and decided as a matter of law that these facts, if true, constituted no defense to the action. The only question to be considered, then, is, Would a judgment so holding be invalid as depriving defendant of its property without due process of law?

(a) As applied to the one issue of the reasonableness of plaintiff's demand, this question can only be answered in the affirmative, in view of the decisions which we have already cited on this point in our preceding argument. We add, however, the following quotations from two of them.

In *Washington* v. *Fairchild*, 224 U. S. 510, we find in the opinion on page 523:

"The commission's order requiring the Oregon Company to make track connection was not a mere adminis-

trative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 416. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 173."

In *Yates* v. *Milwaukee*, 10 Wall. 497, it is said, page 505:

"But the mere declaration by the City Council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Cir-

cuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

It might be well to emphasize that we are not attempting to assert that a mere erroneous decision by a state court of a question of law will in all cases raise a question under the 14th Amendment. The fallacy of such a contention was pointed out by this Court in *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389. That case, like this, was a proceeding in mandamus which was decided on the pleadings. Unlike this, however, the defenses set up in the answer in that case were not based upon any claim of right under the Federal Constitution. In this case, on the contrary, defendant's answer alleged that an enforcement of plaintiff's order would be in violation of the 14th Amendment, since its demand was unreasonable and abritrary.

We are so confident of the correctness of our position in this regard that we feel that we should only burden the court unduly by extending our argument on this phase of the proposition.

(b) Another matter set up in defendant's answer emphasizes the fact that its defense was based upon a claim of right under the Constitution and laws of the United States. Its answer alleged that it was engaged in interstate commerce, with a line at Kansas City extending from Missouri into Kansas, and that the elevation of its bridge as demanded by plaintiff would sever the only means of connection between its line in the two states and prohibit it from continuing its business as an interstate carrier, since it would no longer be able to operate its trains over the bridge owing to its elevation above that of the approaches at either end; that these approaches extended across public streets of Kansas City, Kansas, and their elevation would necessitate a change in the grade of those streets; that defendant had no power or authority to raise the grade of its tracks or the approaches to its bridge

without the consent of the city, and that the city had not given, but had refused to give, its consent thereto. For these reasons, it was alleged, the enforcement of plaintiff's demand would be in contravention of Section 8 of Article 1 of the Constitution, or, as stated in the assignments of error, would deprive defendant of rights and privileges secured to it by the Act of Congress of June 15, 1866 (R. S. Sec. 5258, 14 Stat. L. 66).

The Kansas court did not ignore these allegations, but in its opinion (Record, p. 23) clearly recognized the issues raised by them:

> "There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property."

However, it met this issue by engaging in another of its presumptions (Record, p. 25):

> "As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of unreasonable hostility to the orders of this court or to the welfare of the people comprising the drainage district, and it cannot be presumed they will do so."

Defendant's bridge was a lawful structure, having been built under the powers granted to all railroads in the state of Kansas by G. S. Kan. 1868, Ch. 23, Sec. 47; G. S. 1909, Sec. 1763:

> "To construct its road across, along or upon any stream of water, watercourse, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city."

Defendant was further secured in the use of its bridge by the Act of Congress of June 15, 1866, which provides:

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination."

It is well settled that the police power of a state, for whatever purpose sought to be exercised, cannot legitimately be exerted so as substantially to prohibit or *unnecessarily to burden interstate commerce*. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Atlantic C. L. R. Co.* v. *Wharton*, 207 U. S. 328; *Mississippi Railroad Commission* v. *Illinois Central R. Co.*, 203 U. S. 335; *Illinois Central R. Co.* v. *Illinois*, 163 U. S. 142; *Cleveland, etc., R. Co.* v. *Illinois*, 177 U. S. 514; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Hannibal, etc., R. Co.* v. *Husen*, 95 U. S. 465; *Mo. K. & T. R. Co.* v. *Haber*, 169 U. S. 613.

Likewise, as we have seen to be true with reference to the 14th Amendment, to be repugnant to the commerce clause

of the Constitution or the acts of Congress thereunder, the action complained of need not be that of the legislature, but may be any exercise of state authority by any agency of the state government.

It is said in *Atlantic C. L. R. Co.* v. *Wharton*, *supra*, page 334:

> "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

It is just as well settled, of course, that action by the state, if otherwise unobjectionable, may be upheld even though it affects interstate commerce, provided its operation on such commerce is only indirect and remote. As said by Mr. Justice Brown in *Austin* v. *Tenn.*, 179 U. S. 343, 349:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative, either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that, if the action of the state legislature were a *bona fide* exercise of its police power, and dictated by genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

Thus, it has been said that the states may legislate with respect to the instrumentalities of interstate commerce, so far as such legislation is within their ordinary police powers. *Louisville, etc., R. Co.* v. *Kentucky*, 161 U. S. 677. Such cases have always been sustained, however, upon the theory *that such regulations aid rather than burden such commerce;* and it is clear that a state cannot make such requirements of an interstate carrier as will impair or destroy the usefulness of its facilities. *Atlantic C. L. R. Co.* v. *Wharton*, *supra*; *Missis-*

sippi Railroad Commission v. *Illinois Central R. Co., supra; Cleveland, etc., R. Co.* v. *Illinois, supra; Illinois Central R. Co.* v. *Illinois, supra.*

This Court said in *Illinois Central R. Co.* v. *Illinois, supra,* page 154:

> "The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders, but the state can do nothing which will directly burden or impede the interstate traffic of the company, *or impair the usefulness of its facilities for such traffic.*"

From the cases cited last above it appears that whether or not a requirement sought to be made by a state of an interstate carrier amounts to a direct regulation of interstate commerce or merely affects it indirectly and remotely, may be tested by considering whether or not such a requirement is reasonably necessary. If it affects or burdens interstate commerce *unnecessarily*, it will be held to be invalid as a direct interference with the exclusive power of Congress to regulate such commerce. This is the test expressly announced in *Atlantic C. L. R. Co.* v. *Wharton, supra,* where this Court was considering the validity of an order of the state railroad commission which sought to require the stopping of an interstate passenger train at a certain station in South Carolina.

It is said on page 334:

> "But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but in so far as the existence of such adequate local facilities is involved in the determination of the Federal question of whether the order concerning an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open and may be considered by us."

In view of these well settled principles, if the judgment of the Kansas court in this case was based upon a decision that the order of the plaintiff was a valid exercise of its delegated police power, even though arbitrary and founded upon no reasonable necessity, and although its enforcement would absolutely disrupt defendant's line of railroad and prohibit it from continuing its business thereon as an interstate carrier, then that judgment cannot stand.

The same invalidity, we contend, would inhere in this judgment, even though the raising of defendant's bridge were admitted to be a reasonable and necessary requirement for the end alleged, and even though it were admitted that a state may for the protection of the safety of its inhabitants go to the extent of destroying an instrumentality indispensable to the continued operation of an interstate railroad. If, as we have seen, a state cannot in any event interfere with or burden interstate commerce *unnecessarily*, certainly it will not be permitted to pursue a course the effect of which will be absolutely to destroy a necessary facility of such commerce, *if the same end may as well be accomplished without such result.*

From the pleadings it appears that all that was asked with reference to defendant's present bridge was the elevation of its superstructure to a certain height. This, then, must be taken as the measure of the necessities of the situation from plaintiff's own viewpoint. The court's order in the case, however, went further, commanding defendant "to forthwith remove from the channel of the Kansas river all obstructions of every kind and character" where its line crosses the stream, and "to clear such channel to a height of 340.26 above the Saint Louis Directrix." (Record, p. 16.)

Since the bridge could not stand with the bases of all its supporting piers for a distance of 734 feet (the width of the channel established at this point) resting in the air 340 feet from the ground, the order of the court absolutely prohibits the further maintenance of the present bridge at any eleva-

tion. Such a requirement is not pretended to be necessitated by the exigencies of the situation from the standpoint of flood protection, but is admittedly because of the lack of power in the court to enforce the order of plaintiff as prayed.

Again, while this order was entered with the presumption that the bridge would, in fact, be elevated or rebuilt (Record, p. 25), yet even if defendant's bridge could possibly be elevated or rebuilt under the terms of the court's order, this would have to be at such an elevation as would preclude its further use by defendant, for the reasons stated in the answer. The tracks at either end would be left more than six feet below the level of the bridge, with no power in defendant to elevate them. This result, too, is equally unnecessary.

As shown by the discussion in the court's opinion (Record, p. 23), defendant pointed out in its brief that by a proper procedure, in which Kansas City, Kansas, and all others interested were made parties, this result could be obviated. No objection was made by the court as to the possibility or efficacy of such a procedure, and the precedents cited by defendant in support thereof were not challenged.

The decision of the court thus amounts to a holding that it offers no valid defense against plaintiff's demand to show that it is sought to be enforced in a way which will absolutely destroy a necessary facility of interstate commerce, when it could just as satisfactorily be carried out without any substantial interference with such commerce.

(c) Even if it were admitted that a reasonable necessity existed for the elevation of defendant's bridge to the height specified, still the action of plaintiff herein and the decision of the court upholding it would deprive defendant of its property *unnecessarily*, and consequently without due process of law.

By the same authority under which its order was directed to defendant in this case, plaintiff could have required the necessary action on the part of the city and other property owners involved to enable defendant to comply with its demand. De-

fendant's answer alleged that plaintiff, in attempting to enforce its order without having thus first made compliance therewith by defendant possible, was seeking to deprive it of its property without due process of law, since the enforcement of such order would necessarily result in its loss of the use of the bridge.

The opinion of the court admits in effect that defendant has no authority to *compel* the assent of the city and other parties interested, but bases its decision upon the presumption that defendant, if it desires, may secure such necessary action on their part by *persuasion*, since such parties would hardly "put themselves in an attitude of hostility to the orders of this court or to the welfare of the people comprising the drainage district." It is submitted that to make the further enjoyment of its property depend upon such a mere presumed mental attitude of others when the power was in plaintiff to secure its further use to defendant, deprives defendant of its property without due process of law. *Louisville, etc., R. Co.* v. *Stock Yards Co.*, 212 U. S. 132, 144.

It is no answer to this contention to say that the court's order as finally entered did not require the raising of the bridge and, therefore, will not necessitate the elevation of the approaches across the city streets. If the court does not indirectly order the raising of the bridge, then its order simply amounts to a direction to defendant to destroy the bridge entirely, removing all piers and other parts of it. This total destruction of the bridge when the extreme necessity of the case would require only its elevation would still more obviously deprive defendant of its property without due process of law.

Without extending our argument further, we submit that the judgment of the Kansas court herein, based upon a decision that the demand of plaintiff may be enforced as a valid exercise of the police power, although it is based upon no reasonable necessity and is arbitrary and unreasonable in its requirements, and even though it absolutely and *unnecessarily* prohibits defendant from continuing the use of this portion of its line in

interstate commerce, violates fundamental rights secured to defendant by the Constitution and laws of the United States and deprives it of its property without due process of law.

We respectfully submit that the decision of the Supreme Court of Kansas herein should be reversed.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
Attorneys for Plaintiff in Error.

FILED.
OCT 12 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. 313

MOTION TO DISMISS, AFFIRM OR ADVANCE.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

The Press Print, Kansas City, Kansas

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. **734**

MOTION TO DISMISS, AFFIRM OR ADVANCE.

Defendant in error, The Kaw Valley Drainage District of Wyandotte County, moves the court:

First. To dismiss said cause for the reason that no Federal question is involved, all such questions having been repeatedly determined by this court adverse to

the claims made by plaintiff in error; or, if said motion be denied,

Second. To affirm the judgment of the trial court, for the reason that the writ of error was procured for delay, only, and the questions upon which the decision of the court depend are so frivolous as not to require further argument; or, in the event that both said motions be denied,

Third. To transfer said cause to the summary docket as provided in paragraph five, rule six.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys and Solicitors for Defendant in Error.

ARGUMENT IN SUPPORT OF MOTION.

This is an action for mandamus, brought in the Supreme Court of Kansas, by the defendant in error.

The alternative writ alleges that the defendant in error is a drainage district, organized under Chapter 215, Session Laws of 1905, of Kansas; that the Federal government established harbor lines along the river, which lines coincide substantially with those established by the plaintiff for a levee; that by statute the defendant in error is given authority to determine the height of the superstructure of all bridges crossing the river within the district, and to compel the raising of bridges accordingly; that the defendant owns a bridge across the river within said district; that on or about July 15, 1911, it was notified to raise its bridge, superstructure, abutments, piers, piling and wreckage, but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri, engaged in interstate commerce, its business being that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri, to other railways in Kansas and placing such cars for unloading at the various industries along the line of the defendant's road in Kansas, and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the State of Missouri to and into Wyandotte County, and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge; that if such connection is destroyed or its use rendered unavailable, the line will be separated and its business as an interstate carrier destroyed, and the business of a large number of industries in Kansas greatly injured and in some cases destroyed; that if the bridge is raised as prayed for the defendant's business will be interrupted, its trains cannot be transported across the river, and its line of road will be cut and all its interstate business effectually destroyed; that the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of the defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas, not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount

of private property abutting upon such streets would be seriously and permanently damaged by the change of grade, and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade; that the defendant's tracks on the east side of the bridge are intersected by the tracks of three other railroad companies, and if the bridge is raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that the plaintiff has made no arrangements to have the same done; that a compliance with the demand of the plaintiff would cost more than $30,000.00, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of the plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law, and operate as a direct interference with and a prohibition of interstate commerce, as the defendant carries over its lines interstate freight in carload lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge, which application is pending, and that such change cannot be made without the consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment on the pleadings.

The defendant in its answer claims that to comply with the order applied for will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation

being made to this defendant or any adequate protection to the business interests threatened; also, that the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, contrary to the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and will operate as a direct interference with the interstate commerce, and a prohibition of interstate commerce, in contravention of the provisions of Section Eight of Article Seven of the Constitution of the United States.

The answer further alleged that plans for the modification of the bridge as demanded had never been submitted to or approved by the Secretary of War, and that for that reason the modification as demanded would be unlawful.

Upon motion for judgment upon the pleadings, a mandatory order was issued, as prayed for.

While other questions were, or possibly might have been, raised in the court below, the sole question to be considered by this court is whether, by reason of the facts alleged in defendant's answer, the awarding of the writ was in violation of any rights which the defendant had under the Federal Statute or Constitution, as claimed.

That the state has the right to compel the removal of obstructions in the bed of navigable streams which lie wholly within the state, is no longer an open question.

Northshore Boom Company v. *Necomen Boom Company*, 212 U. S. 412; 29 S. C. R. 355.

Montgomery v. *Portland*, 190 U. S. 89; 23 S. C. R. 735.

Cummings v. *Chicago*, 188 U. S. 410.

That the defendant itself must bear the expense of making changes required by the state, see:

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, paragraph 8.

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S. 583.

"The expense of constructing a railway bridge over a highway made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution which requires that compensation be made where private property is taken for public use."

Cincinnati, etc., Ry. Co. v. *City of Connersville*, 31 S. C. R. 93; 218 S. C. R. 336.

See also, *Chicago, B. & Q. R. R. Co.* v. *Illinois, ex rel Grimwood*, 26 S. C. R. 342, which says:

"The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek, by drainage commissioners acting under the authority of the Illinois Drainage Act, does not amount to a taking of private property for public use which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution."

"It is the settled rule of this court that the interdiction of statutes impairing the obligations of contracts, does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power in its various ramifications is known as the police power, is an exercise of

the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Manigault v. *Springs*, 199 S. C. 480; 26 S. C. 130.

Also, *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583.

From all of which it clearly appears that this court has already decided adversely to plaintiff in error as to every claim of Federal right asserted by it.

Wherefore, no Federal question is involved, and this court has no jurisdiction.

McGilvea et al v. *E. W. Ross et al*, 30 S. C. R. 27; 215 U. S. 95.

Mo. Pac. Ry. Co. v. *Castle*, 32 S. C. R. 606.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

To the Kansas City Southern Ry. Co., Plaintiff in Error:

You are hereby notified that on October 14, 1912, or as soon thereafter as the same can be heard, the defendant in error will present the foregoing motion for hearing.

L. W. KEPLINGER,
C. W. TRICKETT,
Solicitors for Defendant in Error.

SERVICE.

Service of copy of the above motion, argument and notice, is hereby acknowledged the 20th day of September, 1912.

O. L. MILLER,
Solicitor for Plaintiff in Error.

14

No. 313.

Office Supreme Court, U. S.
FILED
MAR 18 1914
JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF KANSAS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

THOMAS A. POLLOCK,
Attorney for Defendant in Error.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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In the Supreme Court of the United States

October Term, 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF KANSAS.

No. 313.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The overflows of the Kansas river occurring at Kansas City in 1903 and 1904 demonstrated the necessity for the improvement of the Kansas river and the regulation by the public of the construction and maintenance of bridges thereover.

The Kaw Valley Drainage District of Wyandotte County, Kansas, hereinafter referred to as the Drainage District, was incorporated in 1905 under the provisions of Chapter 215 of the Session Laws of Kansas for 1905, the same being sections 3000 to 3056 of the General Statutes of Kansas of 1909.

The Kaw Valley Drainage District is a public corporation invested by the state (subject to the jurisdiction of the United States as to navigation only) with the exclusive control of the portion of the Kansas river within its limits. Said district is expressly authorized to control and regulate the use and improvement of said river, including the construction and maintenance of bridges.

The Statutes Defining Powers of the Drainage District.

Section 3006, General Statutes of 1909, provides:

> **"3006. General Powers of District.** That each drainage district incorporated under the provisions of this act shall be a body politic and corporate and (subject to the superior jurisdiction of the United States over navigable waters) is hereby granted *exclusive control* of the beds, channels, banks and of all lands the title to which is vested in the state of Kansas, lying between the banks at high water mark, of all natural water courses within such district. And every drainage district so incorporated shall have power * * *.
>
> "*Second*, To sue and be sued in its corporate name * * *.
>
> "*Fourth, To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to* so widen, deepen, establish, *regulate and maintain the channels thereof*, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to

result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *

"*Fifth*, To prescribe, regulate *and fix the height of the superstructures above the water*, the length of all spans and the location of the piers of *all bridges* across water courses situated in the district.

"*Sixth*, To construct levees across the rights-of-way, road-beds, tracks and lands of railroad companies and street railroad companies, and to condemn and appropriate by the exercise of the right of eminent domain in the manner hereinafter provided sufficient of such rights-of-way or other lands of any such railroad company or street railroad company as may be necessary for the purpose of constructing and maintaining a continuous levee of uniform height across the same.

"*Seventh*, To fix, regulate *and change the grade or elevation of all public highways, railroads* and street railroads at points where any levee may cross or intersect the same.

"*Eighth*, To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee, so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course.

"*Ninth*, To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing or maintenance in any natural water course of any unauthorized bridge, embankment, pier or other work or structure *constituting to any extent whatever an obstruction to the flow of the water*. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *

"*Fifteenth*, To make all contracts and do all other acts in relation to the affairs of the district necessary to the proper exercise of its corporate legislative or adminis-

trative powers and to the accomplishment of the purpose of its organization.

"*Sixteenth,* To do all other acts that may be necessary to carry out and execute the general powers hereinbefore and hereinafter granted, although not hereinbefore specifically enumerated."

"3037. That if it shall be determined by the board of directors of any drainage district that it is necessary to construct any levee across the right-of-way, road-bed or tracks of any railroad or street railroad company or across any street or highway occupied by such tracks and it shall be necessary to raise or elevate such tracks in order to make such levee continuous and of uniform height, such board of directors shall make an order requiring such railroad or street railroad company to raise or elevate its tracks accordingly, specifying in such order the height to which such tracks shall be so raised or elevated and fixing a reasonable time within which it shall be done, and shall forthwith serve a copy of said order upon such company by delivering the same to any officer, agent or employee of such company found within the district, and it shall thereupon become and be the duty of such company to raise or elevate its tracks to conform to the requirements of such order; and upon failure of any such company to perform such duty within the time so fixed, the board of directors shall be entitled to a writ of mandamus to compel the performance of such duty and may bring and maintain a suit in any court of competent jurisdiction to obtain such writ and remedy."

Chapter 172 of the Laws of Kansas, Session of 1911, amendatory of and supplemental to Chapter 215 of the Laws of 1905, provides that, *when harbor lines have been established by Federal authority along navigable streams running through drainage districts,* that all lands lying between such harbor lines together with a strip forty feet wide on the land side of

and contiguous thereto shall be deemed to be necessary for the protection of the health, life and property of the people of the district, and appropriated for such use. Said act provides for the issuing by the governor of the state of a proclamation declaring the appropriation of a strip of land forty feet wide on the land side of and contiguous to such harbor lines; *and such a proclamation was issued as to the Kaw Valley Drainage District by the governor of the state of Kansas on February 3, 1911.*

Section 7 of said Chapter 172 provides:

> "Section 7. That any railroad or railway company having a right-of-way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right-of-way but shall be permitted to retain the right it now has for the purpose of crossing or running along, upon or over such levee; *provided, however, that such use and occupancy shall not interfere with the widening* of such stream and shall not become an obstruction to the flow of the water therein and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflow."

The Commencement of This Suit.

On February 9, 1912, the Drainage District filed its motion and affidavit in the Supreme Court of Kansas for a writ of mandamus against the Kansas City Southern Railway Company, hereinafter referred to as "the Railway Company," to compel said company to raise its bridge at Ohio avenue in Kansas City, Kansas, in said Drainage District, so that the lowest point of the superstructure would be in elevation 340.26 feet above the St. Louis Directrix, *and to remove "the old bridge, superstructure, abutments, piers, piling and wreckage."*

An alternative writ of mandamus was issued by the court, which writ, omitting the caption and formal portions thereof, is as follows:

Alternative Writ of Mandamus.

1. Comes now the plaintiff and files its motion and affidavit for a writ of mandamus, and alleges and shows to the court:

2. That the plaintiff, the Kaw Valley Drainage District of Wyandotte County, Kansas, is a public corporation, duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the state of Kansas.

3. That the defendant, the Kansas City Southern Railway Company, is a corporation duly organized and existing according to law.

4. That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

5. That the Federal Government established harbor lines along said river, which harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

6. That under and by virtue of the statutes of the state of Kansas, the plaintiff herein was given the authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said district, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

7. That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

8. That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th day of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix, *and to remove the old bridge superstructure, abutments, piers, piling and wreckage.* That the said defendant has failed, neglected and refused so to do.

9. Wherefore, plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge, so that the lowest point of superstructure will be 340.26 feet above St. Louis Directrix; and that it remove the old bridge superstructure, abutments, piers, piling and wreckage.

10. That the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto. And for such other and proper relief as to the court may seem right and proper.

The concluding portion of the writ is as follows:

11. *Now, Therefore,* we do command you that upon receipt of this writ, that you raise and elevate your bridge, known as "the Ohio Avenue bridge" over the Kansas river, 6.5 feet, or so that the lowest point of superstructure will be 340.26 feet above St. Louis Directrix; and that you commence said work at once and proceed with the same as rapidly as possible

until completed, or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at two o'clock p. m. of said day, and show cause by answer filed herein why you should not do so. And have you then and there this writ with your return thereon, showing that you have complied or will not comply with the contents hereof, or the reasons why you have not or will not do so.

The hearing upon the writ and answer is hereby set for the 20th day of February, 1912.

Return and Answer of the Railway Company to Alternative Writ.

The return and answer of the Railway Company to the alternative writ, omitting the caption, signatures, verification and indorsements and inserting the amendments made to said answer at their proper place therein, and numbering the paragraphs, is as follows:

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein says:

1. That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

2. Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the state of Kansas.

3. That the defendant is a railway corporation duly organized and existing according to law.

4. That the Kansas river flows through the Kaw Valley Drainage District.

5. That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed "the Ohio bridge."

6. Defendant alleges that it is a railway corporation duly organized under the laws of the state of Missouri, and is a resident and citizen of said state of Missouri and not a resident or citizen of the state of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the state of Missouri and from states other than Kansas to and into Wyandotte county and state of Kansas, and from Wyandotte county in the state of Kansas to the state of Missouri and to states other than the state of Kansas.

7. That the defendant's railway tracks extend from Jackson county, state of Missouri, into and through Wyandotte county and state of Kansas. That its business is that of a switching company in addition to its interstate business as a common carrier of freight and passengers, and its main line of railroad crosses over said bridge and defendant carries thereon and thereover interstate freight, both in carload and less than carload lots, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the state of Missouri to other railways in Kansas, and

placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

8. That the defendant's railway tracks situated in the state of Missouri extend to and into Wyandotte county, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein, and usually called the Ohio bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Ohio bridge, *and if* such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable, said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

9. That defendant's tracks on the east side of said bridge are intersected by the tracks of the Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company and Chicago Great Western Railroad Company; *that if* said bridge is raised, as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised the tracks of said other lines of railway intersecting defendant's tracks, would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; *that the plaintiff has not arranged* by

voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised, and that the owners thereof refuse to raise the same.

10. Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas river 6.5 feet above their present level, *and, if* this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas river since it will be unable to either go on to or off of said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

11. That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, *and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks;* but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, *which streets are not under the control of this defendant, but under the exclusive control of the city of Kansas.*

12. That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, *and the plaintiff* has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor.

13. That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge, *unless* the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

14. That the city of Kansas City, Kansas, *has not raised the grades* of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant *if* the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

15. *It therefore results* that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply *with the demand of the plaintiff as set forth* in the petition and writ herein, *since* such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

16. That such demand of the plaintiff as set forth in the petition and writ herein, is *unreasonable, illegal, arbitrary,* and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce *or* necessitate wrongful and illegal acts of the defendant upon the public streets of

Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.

17. Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto, *if permitted*, will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this plaintiff many hundred thousand dollars.

18. Plaintiff herein has no power or authority under the statutes of the state of Kansas, or otherwise, to require the defendant's bridge, which is now built and in use, to be raised.

19. That the defendant has made application to the Chief of Engineers and Secretary of War of the United States for approval of plans *for rebuilding the bridge in question* and such application is now pending and by reason thereof said bridge cannot be raised without permission of said Federal officials.

20. That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

On March 23, 1912, a stipulation was filed, providing that the case should be set down for hearing on April 5, 1912.

On April 5, 1912, the Drainage District moved for judgment upon the pleadings. The journal entry of submission

(paragraph 34, Record) shows that the cause was heard on the pleadings, and that this suit, together with No. 314, *Kansas City Terminal Railway Company, Plaintiff in Error,* v. *Kaw Valley Drainage District,* involving similar questions, was submitted upon the motions for judgment on the pleadings, on briefs for both parties and after oral argument by counsel, and taken under advisement by the Court.

The judgment commanded the defendants in said suits to forthwith remove from the channel of the Kansas river *all obstructions* of every kind and character where their lines cross the stream, and command the Kansas City Terminal Railway Company to clear such channel to a height of 342.773 feet above the St. Louis Directrix, *and commanded the Kansas City Southern Railway Company to clear such channel to a height of 340.26 feet above the St. Louis Directrix.*

The cases were argued and considered together in the Supreme Court of Kansas and one opinion written for both suits. The same is set forth at length, pages 16 to 25 of the Transcript of Record.

BRIEF OF ARGUMENT.

I.

This Court has no jurisdiction because there is no Federal question in this case.

1. The record does not show that any right of the company protected by the Federal Constitution was put in issue or decided. The Company claims that its answer to the alternative writ shows that a Federal question was involved in this suit. The District contends that in order for an answer to raise a Federal question, it must state facts presenting such question; that a mere conclusion of law inserted in the answer, to the effect that a certain order or demand of the District constitutes a taking of its property for public use without compensation, or without due process of law, or denies to it the equal protection of the laws, without a statement of facts so showing, is insufficient. That the alleged Federal questions appear from an examination of the pleadings to be fictitious.

2. The decision of the Supreme Court of Kansas is in substance that the answer and return of the Railway Company set forth no defense to the alternative writ, and that the pleadings before that court invested it with jurisdiction to issue the peremptory writ set forth in the record. The question whether the Supreme Court of Kansas erred in holding that it could rightfully decide upon the pleadings, that the peremptory writ shown by the record should be allowed, is a question of pleading and practice to be conclusively determined according to the general principles of the laws of Kansas applicable thereto.

II.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial to the defendant of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

1. The argument of the Company on this proposition is not supported by the record. It assumes, contrary to the record, that there were issues of fact as to the truth of material allegations of the alternative writ.

2. It is a common and permissible practice where an answer does not allege any defense, to render judgment for the plaintiff on the pleadings. The Railway Company had notice and was fully heard before the rendition of the judgment. Whether or not the answer raised an issue of fact necessary to be supported by evidence to entitle the Drainage District to judgment, or stated any valid defense, and whether the pleadings before the court were sufficiently broad to invest that court with jurisdiction to issue the peremptory writ set forth in the record, were questions within the jurisdiction of the Supreme Court of Kansas to decide, dependent upon general principles of law, and not involving any provision of the Constitution of the United States.

III.

Neither the order of the Drainage District, nor the judgment of the Supreme Court of Kansas, constitute a taking of the Company's property, or denies to it the equal protection of the law or deprives it of its property without due process of law.

1. The alleged interference with interstate commerce, the alleged refusal of Kansas City to change the grade of certain streets, the alleged application of the Company to the War Department for leave to rebuild its bridge, assuming (what is not admitted) that the same were well plead, are in law insufficient defenses.

2. The answer admits all the allegations of the alternative writ, including the allegation that the district made and served upon the Railway Company "as set forth in its petition" for the writ, an order to raise the bridge six and one-half feet, and to remove the old bridge, superstructure, abutments, piers, piling and wreckage, and that the Company refuses so to do.

3. The answer contains no allegation raising an issue as to the reasonableness of the requirement of the District that the bridge be elevated, so that the lowest point of the superstructure be 340.26 feet above the St. Louis Directrix, or as to the reasonableness of the demand of the District for the clearing of the channel to the elevation of 340.26 feet.

4. The power of the directors of the Drainage District to fix the elevation of the bridge and to condemn old bridges or parts thereof as obstructions, is legislative in its nature and its exercise not subject to review by the courts. In any event, this is true when the question of the reasonableness of the order is not challenged in the answer by appropriate allegations of fact.

5. It is the duty of the Company to elevate its bridge and to clear the channel, as required by the Drainage District, at its own expense, and the judgment of the Supreme Court of Kansas requiring it so to do does not deprive the Company of its property without due process of law, nor constitute a taking of its property for public use, nor deny to the Company the equal protection of the laws. The loss incident to the enforcement of the police power of the state in such a case is *damnum absque injuria*, and does not constitute a taking of the Railroad's property for public use.

6. The Company went to trial on an issue of law. It has not asked leave to amend its answer. It submitted its rights for final judgment on an issue of law presented by a motion for a peremptory writ.

IV.

The judgment that the Railway Company clear the channel to the elevation required is within the scope of the relief demanded by the alternative writ of mandamus. The Supreme Court of Kansas had, by virtue of the pleadings, jurisdiction over the bridge and the river, and its peremptory writ is not erroneous or void because of want of jurisdiction to order the channel of the river to be cleared to an elevation of 340.26 feet.

BRIEF AND ARGUMENT.

I.

This Court has no jurisdiction. There is no federal question in this case.

The alleged Federal questions are fictitious.

New Orleans v. *New Orleans Water Works Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142.

The Kansas Supreme Court held on a motion for a peremptory writ that the answer stated no defense.

In *Iowa Cent. Ry. Co.* v. *State of Iowa*, 160 U. S. 394, 16 Sup. Ct. Rep. 344, this Court decided:

> "The question whether the highest state court erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer, set forth no defense to the claim of the plaintiff, is not reviewable on appeal to the Supreme Court."

Justice White, delivering the opinion of this Court, at page 345, says:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz.: whether or not the highest court of a state erred in holding that it could rightfully determine, from the statements in the

pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff."

II.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

It appears from the record that the argument of the Company on this proposition is based upon a false hypothesis. The Company assumes:

First, That by its answer it put in issue the reasonableness of the District's order to raise the bridge and clear the channel of obstructions to an elevation of 340.26 feet.

Second, That the Supreme Court of Kansas ignored such an issue, and without requiring any evidence from the District or affording the Company an opportunity to offer evidence upon such an issue, decided the issue against it in effect by awarding a peremptory writ requiring it to clear the channel to an elevation of 340.26 feet.

The record does not show any such issue was raised by the pleadings; therefore, no evidence was proper or admissible thereon. The record shows that the District moved for a peremptory writ on the pleadings; that an issue of law was thus presented between the parties; that it was decided against the Company; that it asked for a rehearing thereof; that it made no application for leave to amend its answer and that a peremptory writ was ordered.

The Railway Company by its brief obscures the real questions involved. It assumes that various affirmative defenses are well plead in its answer, some of which are insufficiently plead, others practically not mentioned.

Some of the matters attempted to be set up would not constitute any valid defense no matter how fully stated. Other matters argued as a defense, if properly plead, might have raised an issue of fact and thus required the overruling of the motion for a peremptory writ.

The Supreme Court of Kansas properly ignored in its decision and opinion any reference to the reasonableness of the order of the Drainage District requiring the bridge to be raised six and one-half feet. The answer does not present any such issue or defense. The Company does not allege that the bridge is high enough; that three feet instead of six and one-half would be a sufficient raise; that the channel was of sufficient width and depth or capacity to carry off all floods which might reasonably be anticipated; that the height of the bridge was such that it did not constitute any interference with the free navigation of the river, or any facts raising any issue as to the reasonableness of the order requiring it to raise its bridge six and one-half feet. Nor does the answer allege any fact raising an issue of fact as to the reasonableness of the demand of the District for the removal of "the old bridge superstructure, the old piers, abutments, piling and wreckage" about the same. If the Company had alleged that removal of the present bridge was unnecessary; *that it was willing to repair or reconstruct it;* that the superstructure could be raised; *that piers are necessary on account of width of river;* that the present piers and abutments could be built up six and one-half feet, that the present piers and abutments are constructed of good material, of proper dimensions, rightly located, and sufficient to carry the bridge and withstand floods if so repaired; that the river is not navigated sufficiently to require any raise of the

bridge to accommodate navigation or any other matters raising an issue of fact as to the reasonableness of the District's demand for the removal of the old bridge, the questions now presented for decision would be different. Such allegations might be held to raise issues of fact, and would be perhaps an excuse for the claims and arguments of the Company that its bridge is to be taken or destroyed without compensation or due process of law.

The Admissions by the Answer.

The answer admits all the material allegations of the writ. The Railway Company admits by its answer: (1) the corporate existence of the parties; (2) that the Kansas river flows through the Drainage District; (3) that it owns the bridge in controversy; (4) that the District demanded of it the elevation of its bridge and the removal of the old bridge, "as set forth in the petition," and that it refuses to comply.

The first three of the allegations above mentioned are admitted in express terms. The fourth is admitted both expressly *and by the legal effect of the answer.*

The defenses relied upon by the Company are inconsistent with a denial of the material allegations of the alternative writ. If no order or demand was made by the District for the elevation of the bridge or its removal, *then there is no foundation for the affirmative defenses* that the District's order is an interference with interstate commerce; that it would require the raising of the approaches to the bridge; that it would cost over $30,000 to raise such approaches; that the District has no power or authority to make such an order, and that the order is unreasonable and, therefore, void. The affirmative defenses set up in the answer are inconsistent with a denial that an order for the elevation and the removal of the bridge was made and notice thereof given to the Company. The answer

was necessarily one of confession and avoidance. *The Company by its answer confesses the truth of all the material allegations of the writ, but seeks to avoid compliance with its command by a statement of new matter as affirmative defenses.* The general denial with which the answer commences is in effect eliminated by an attempt to set up as affirmative defenses: (a) that the District's order is void because an unlawful regulation or interference with interstate commerce; (b) that the raising of the bridge to the elevation demanded would require the raising of the tracks leading to it; that those tracks extend across and along certain public streets of the city of Kansas City, and that said city refuses to change the grade of those streets; (c) that if the consent of the city to the elevation of those tracks was secured, the work of reconstructing them would cost the Railway Company over $30,000; (d) that plans for the rebuilding of the bridge have been submitted to the Chief of Engineers and Secretary of War of the United States for approval, and that the bridge cannot be raised without permission of said officials; (e) that the Drainage District has no power or authority to require the bridge to be raised.

Paragraphs 15, 16 and 17 of the Company's answer are as follows:

> "*It therefore results*, that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply *with the demand of the plaintiff as set forth* in the petition and writ herein, *since* such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which its serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.
>
> "*That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary,*

and beyond the power of said plaintiff to make, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.

"Defendant further says, *that a compliance with the demands of the plaintiff* in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, *and the destruction of its bridge* for railway purposes will injure and damage this plaintiff many hundred thousand dollars."

The allegations quoted constitute an express admission by the company, *that the district has made an order for the elevation of its bridge and the clearing of the channel. Manifestly the legal effect* of the answer is to assert the making of the order and demand for the elevation of the bridge and the clearing of the channel, and refusal to comply on the part of the Company. Such a construction of the answer is the basis of the affirmative defenses attempted to be set up therein.

The Law as to Pleading and Practice in Answers in Mamdamus.

In the mandamus case of *Crans* v. *Francis*, 24 Kan. 754-755, Justice Brewer, delivering the opinion of the Supreme Court, said:

"The plaintiff files a motion to quash the answer. * * *

The entire nature of this proceeding is, as we have had occasion heretofore to notice, changed by statute. *State* v. *Jefferson Co.*, 11 Kan. *66. It is now in its form

very like an ordinary action. No other pleadings are allowed than the writ and answer. *These pleadings are to be construed, and to have the same effect as pleadings in a civil action; and the issues are to be tried, and further proceedings had, as in a civil action.* Code, Sec. 696. Under those rules, a motion to quash the answer is a challenge of the substance of such answer. It asks that as a whole it be rejected; in other words, it claims that, construed by the ordinary rules of pleading, it contains no defense. If sustained, it strikes out the entire pleading, and leaves the plaintiff's pleading admitted. It is not in the nature of a motion to make specific and definite, for such a motion implies a defense presented, though imperfectly pleaded; neither is it equivalent to a motion to compel defendant to elect, for such a motion implies the existence of two or more defenses. This motion denies any defense. It is like a motion to strike out the answer as containing no defense, or a motion for judgment over the answer, or a demurrer to the answer. It attacks the substance, and not the form, and says that no defense is presented. Strictly, then, if any defense appears in the answer, the motion must be overruled. * * *

The answer commences with a general denial. As there are many facts in and essential to plaintiff's petition which require proof, and are not admitted by a failure to deny under oath, this of itself is a sufficient answer, and compels the overruling of this motion, *unless the matters thereafter admitted in the answer of themselves show that plaintiff is entitled to the relief asked.*"

A Motion for Judgment on the Pleadings Proper Practice When the Answer Is Insufficient.

In 26 Cyc. 489, the author says:

"It is common practice for relator to move for a peremptory writ on the return, or on the papers equivalent to the return, instead of pleading or joining issue

on the return, or going to trial. Such a motion operates as a demurrer to the return or other defensive matter, so as to admit the truth of all matters sufficiently pleaded therein. But matter not well pleaded in the return or answer, such as conclusions of law, will not be taken as admitted."

In 13 Encyl. Pl. & Pr. 777, the rule is stated as follows:

"When the plaintiff's allegations are sufficient if true, and the pleadings filed by the respondent present no issue of fact and virtually amount to no answer, the proper practice is to direct the issue of a peremptory writ."

See also to same effect High's Extraordinary Legal Remedies, Sec. 477.

In the recent case of *Emporia* v. *Rly. Co.*, 88 Kan. 611, a mandamus suit, the plaintiff moved for and recovered final judgment on pleadings. In that case the answer of the railway contained a general denial and also alleged matters in avoidance, including a claim that it was being deprived of its property in violation of the Constitution of the United States.

In *Hutchison* v. *Myers*, 52 Kan. 290, in the second paragraph of the syllabus, the court decides:

"Where the answer of defendant admits the cause of action stated in plaintiff's petition, and its averments are insufficient to constitute a defense, the court may, upon motion of plaintiff, allow and enter judgment in his favor upon the pleadings."

In the opinion, at page 295, Chief Justice Johnston, speaking for the court, says:

"The motion for judgment on the pleadings was equivalent to a demurrer to Hutchison's answer, and is a common and permissible practice. If the averments of

the petition were sufficient, and the answer did not allege a defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment."

Confession and Avoidance.

In 26 Cyc. 452-489, the rules of pleading in returns to alternative writs of mandamus, p. 452, are stated as follows:

> "Instead of traversing the matters set forth in the alternative writ or petition, respondent may plead by way of confession and avoidance, and if he relies on new matter excusing non-performance of the commands of the writ, this must be set up in the return. *Great strictness of pleading is required in returns which set up matter of confession and avoidance.*
>
> Relator is entitled to the benefit of all admissions made by respondent in the return (p. 453).
>
> The return or answer must set out the facts relied on as an excuse for non-performance so that relator may traverse them. Accordingly it is insufficient if it states conclusions of law without alleging the facts on which they are based" (p. 454).

In High's Extraordinary Legal Remedies, Secs. 472, 473 and 474, the author states that where the answer is in its nature *a confession and avoidance* its allegations must be direct and positive and state the facts with precision and certainty.

In 13 Encyl. of Pl. & Pr. 725, the author says:

> "The respondent in mandamus may either deny or confess and avoid; that is, he may either deny the facts upon which the relator bases his claim to relief, or, admitting those facts to be true, may set up other facts which show that the defendant is under no obligation to perform the commands of the writ. *Every answer must do one or the other of these things.*

When the respondent sets up facts in confession and avoidance, those facts must be stated with precision and certainty, according to the rules of pleading required in the answer.

It is not permissible to set up inconsistent or repugnant defenses."

In the case of *Woodruff* v. *New York & N. E. R. Co.*, 20 At. 17, is illustrative of the law. The sufficiency of the answer of the railway company in a mandamus suit to compel it to improve a street crossing was involved. The court in its opinion (at page 20) says:

"The return of an alternative writ is demurrable unless it shows a right to refuse obedience to it; *and it must state the facts which justify such refusal clearly, specifically, and with such sufficient certainty that the court can see at once that such facts, if admitted or established, do furnish a legal alternative for obedience to the writ.* High Extr. Rem., Secs. 449-460; *State* v. *Lean*, 9 Wis. 279; *Springfield* v. *Commissioners*, 10 Pick. 59, Mos. Mand. 210; *Bank of Albany* v. *Commissioners*, 10 Wend. 25.

"There is in the return before us no direct denial of the facts alleged in the alternative writ, and it is possible that such a denial, had it been made in the case, would not have withstood the test of a demurrer. It would deny in terms what the court would be bound to know judicially to be true, *i. e.*, the existence and the terms of the legislative resolutions; *while the order made by the commission, and the non-compliance therewith, are admitted, or made a part of the return itself.* We need not discuss this. A general denial puts in issue the existence of those facts, which if true, constitute a *prima facie* cause of action or ground of defense. *When these facts exist, but, by reason of some extraneous features or elements affecting them, they do not produce the otherwise necessary result, that element which destroys the prima*

facie legal effect of the facts is not put in issue by such a denial. It is new matter, and must be specially pleaded. And so, where a legal right to refuse obedience to a writ can be shown in no other way than by setting forth such extraneous features or elements, a return that omits them is clearly bad on demurrer."

In *C. K. & W. R. Co.* v. *Comm'rs of Chase County*, 49 Kan. 399, the court in the third paragraph of the syllabus decides:

"In a proceeding of mandamus, to compel the performance of a public duty, *no formal demand upon the defendants is necessary* where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing."

In *Northern Pac. R. Co.* v. *Washington*, 12 Sup. Ct. Rep. 283, at page 289, the court in its opinion says:

"The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (*Attorney General* v. *Boston*, 123 Mass. 460, 479; Code Wash. T., Sec. 2171); *and no demand upon the defendant was necessary before applying for the writ.* (*Com.* v. *Commissioners*, 37 Pa. St. 237; *State* v. *Board*, 38 N. J. Law 259; *Mottu* v. *Primrose*, 23 Md. 482; *Attorney General* v. *Boston*, 123 Mass. 460, 477.)"

The Allegations of the Writ Not Admitted Immaterial.

The only allegations of the alternative writ not admitted to be true by the Railway Company are: that the Kansas river is a navigable stream; that it overflowed its banks in 1903;

that a large part of the city of Kansas City was flooded and millions of dollars' worth of property lost by reason thereof; that harbor lines were established by the United States, which lines coincide with those established by the Drainage District for a levee along the banks of the river, and that the plaintiff has authority to determine the elevation of bridges across the Kansas river and to compel the raising of bridges by mandamus in accordance with its orders. These are allegations of matters of fact and law of which the trial court, *and this Court as well*, will take judicial notice. Section 5724, Genl. Sts. of Kan. 1909, provides that, "neither presumptions of law nor matter of which judicial notice is taken need be stated in a pleading."

Senate Document No. 160, 58th Congress, Second Session, is a letter from the Secretary of War to the President of the Senate, transmitting therewith reports of a board of engineers on the establishment of harbor lines in Missouri and Kansas rivers at Kansas City and on the subject of obstructive bridges and flood conditions in the Kansas river at and near its mouth. This document was printed by order of the Senate. At page 4 the Kansas river is reported to be navigable and the establishment of harbor lines discussed. At pages 5 to 7 this document contains a report as to obstructive bridges over the Kansas river at Kansas City, Kansas, in which it is said:

> "The Kaw river, for a distance of 17,000 feet above its mouth, is in a condition that constitutes a dangerous menace to life and property on its banks. The channel has been encroached upon by riparian owners until its normal average width of about 850 feet (minimum 540 feet), as shown by the meander lines of 1856, is reduced to an average of about 590 feet, with a minimum in one place of 420 feet.
>
> "*Bridges have been built with more piers than are necessary.* The piers have not been carried down to rock, but have been founded on piles, the masonry work ex-

tending but a short distance below low water. To protect the foundations from scour, immense quantities of loose rock have been deposited around the piers until each pier is virtually an island of rock in the river. Between the piers the falsework piles used during construction have generally been cut off at or near low water and left in the stream.

Besides these obstructions caused by the bridges there have been built from time to time stone dikes extending into the stream from both banks. Other obstructions, the purpose and history of which cannot be determined, exist all along this part of the river.

The result is that the natural channel of the stream has been materially diminished, its bottom has been made so rigid that it will not yield to scour during high water, and its original capacity to carry off floods has probably been *reduced by one-half*."

As to the navigability of the river at Kansas City, at page 6 of this document, it is said:

"The Board submits the following data upon the status of this stream as a navigable waterway of the United States:

Steamboats have ascended the river as far as Fort Riley, Kan. This was before any artificial obstructions in the form of bridges or dams had been made.

The Government has twice required reports upon the feasibility of improvement works on the stream in the interests of navigation.

In 1898 the Government built certain works for the improvement of the river a short distance above the mouth, pursuant to Act of Congress of July 1, 1898, which provided that the sum of twenty thousand dollars, or so much thereof as may be necessary, shall be expended in widening and cleaning out the mouth of the Kaw river where it empties into the Missouri river at Kansas City.

Although navigation is almost entirely cut off by the artificial obstructions in the channel, there was until

recent years considerable traffic in sand within the limits of Kansas City, and if the channel were again opened there would be an active business in this line.

The Government has never exercised any supervision over bridges built across the Kaw river.

Congress has in one case granted authority to construct a bridge over the river. (Act of March 17, 1886.)

The Government has on different occasions caused obstructions to be removed from the stream within the limits of Kansas City, Kan., and its authority to do this has been acquiesced in without protest except in one case.

The navigable portion of the river lies wholly in the state of Kansas, the mouth being a few hundred feet above the point where the state line between Kansas and Missouri intersects the right bank of the Missouri river."

At pages 7 to 23 the report treats of flood conditions at and near the mouth of the Kansas river and estimates (p. 12) the loss from the flood of 1903 at from $20,000,000 to $30,000,000.

The attention of the Court is called to the annual report of the Chief of Engineers of the United States for 1910, page 1833. This report shows that on June 24, 1910, harbor lines were duly established by the Secretary of War of the United States for the Kansas river at and beyond the bridge in controversy, pursuant to a resolution of Congress of date February 16, 1909, authorizing the Secretary of War to fix and etsablish pier-head and bulk-head lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulk-heads or other work shall be extended or deposits made, except under such regulations as shall be described from time to time by the Secretary of War.

This Court may also take judicial notice of the maps accompanying the said report, establishing harbor lines, on file in the office of the Chief of Engineers of the United States

in compliance with the resolution of Congress aforesaid, and indorsed as follows: "In compliance with public resolution of Congress February 16, 1909. Harbor lines for Kansas River at Kansas City, Kansas, mouth to Argentine wagon bridge. Kansas City, Mo., May 20, 1910, to accompany report of this date on public hearing January 25-27, 1910. Authorized by the Chief of Engineers, U. S. Army. Edward H. Schulz, Major Corps Engineers, U. S. A. War Department, Washington, D. C., June 24, 1910. Approved: Robert Shaw Oliver, Acting Secretary of War."

The public officers' report and map above mentioned show the establishment of harbor lines, the width of the channel, the location and number of piers and abutments of the bridge in controversy and the location with reference to the public streets of Kansas City, Kansas. From this map it appears that both of the abutments of the defendant's bridge are within the harbor lines, and that it is 185 feet from the west harbor line to the west abutment of the bridge.

The court is also requested to take judicial notice of Document No. 94 of the House of Representatives, 62nd Congress, First Session, printed by order of the Committee on Rivers and Harbors on July 19, 1911, which document contains a report of the survey of the Kansas river from its mouth to Argentine, Kansas, made pursuant to an Act of Congress of March 3, 1909.

At page 14 of that document, it is said:

> "The following are the correct data for bridges, including their modifications, to conform to the approved harbor lines and for a clear elevation equal to the flood height of 1903." (Here follows a tabulated statement as to the location, elevation, length, number of piers and cost of reconstructing bridges over the Kansas river in the Kaw Valley Drainage District.)

The report as to the defendant's bridge is as follows:

> "No. 4, Kansas City Southern. Approximate distance above mouth, 4,450 feet. Present lowest point of superstructure, 333.76 feet. Required lowest point of superstructure, 340.26 feet. Required additional height, 6.50 feet. Distance of the face of present abutment to harbor line, left bank, 185.8 feet; right bank, 7.9 feet. Approximate required additional length, 193.7 feet. Number of piers, 2. Approximate cost of *reconstruction*, $177,545."

The document last above cited also contains as a part thereof a map of the Kaw Valley Drainage District, purporting to have been made to accompany said report of December 9, 1910, by Edward H. Schulz, Major Corps of Engineers, U. S. A.

> "Maps and reports made by authority of law by public officers may be judicially noticed by an appellate court." (7 Ency. of Evidence 882.) *Bryan* v. *Forsyth*, 19 Howard 334; *Watkins* v. *Holman*, 16 Peters, page 35; *Gregg* v. *Forsyth*, 24 Howard 179; *U. S.* v. *Teschmaker*, 22 Howard 405.

In *Kirby* v. *Lewis*, 39 Fed. 67, the court decided:

> "The official report and correspondence of public officers of the state and the United States, relating to the swamp lands of the state, and published by authority of the Legislature, are public documents, *which the court has a right to consult, even if not made formal proof in the case.*"

See also, 17 A. & E. Ency. of L. 901; 9 A. & E. Ency. of L. 880.

An appellate court must take notice of everything which the court whose judgment it is reviewing, is bound to notice. *Tischner* v. *Rutledge*, 35 Wash. 285, 77 Pac. 388; *Smith* v. *City*, 27 Kan. 523.

An appellate court will not interfere with the trial court's action based upon its judicial knowledge, unless it has manifestly erred. *People* v. *Mayes*, 113 Cal. 618, 45 Pac. 860; 7 Ency. of E. 882-883.

The Supreme Court of Kansas takes judicial notice of the navigability of the Kansas river. *Wood* v. *Fowler*, 26 Kan. 682; *Hoyt* v. *Russell*, 117 U. S. 401.

The Supreme Court of Kansas refers to the reports, documents and maps above mentioned (copies of which are deposited with the clerk of this Court) in its opinion (pp. 44-45 Record.)

III.

Neither the order of the Drainage District nor the judgment of the Supreme Court of Kansas constitute a taking of the Company's property, or denies to it the equal protection of the law, or deprives it of its property without due process of law.

Neither the order or judgment constitutes any wrongful interference with interstate commerce or any business of the Company.

The order of the District requiring the Railway Company to raise its bridge six and one-half feet is not a regulation of commerce nor a wrongful intereference therewith. The Railway Company admits in its answer that it can raise its bridge and operate its trains thereover if the approaches leading thereto are also raised several feet. Its real contention is that it has no authority to raise the approaches to its bridge because of an alleged refusal of the city of Kansas City to make such changes in grades of streets as will be necessary when its bridge is elevated, as required by the order of the District.

The allegation that the city "has not raised the grades of any of its streets upon which the approaches rest, and has refused to make such changes in the grades of such streets as will necessarily be required in the operation of trains by the defendant if the elevation of its bridge is increased in accord with the demand of the plaintiff," is an admission that if the approaches are raised, the use of the bridge may be continued as heretofore. This objection on the part of the Company is an argumentative, conditional, contingent or conjectural conclusion on the part of the Company, and insufficient to excuse the Company from raising its bridge or clearing the channel of the river to a height of 340.26 feet.

The fact that the Railway Company is engaged in interstate commerce does not prevent the state acting, through its duly authorized agent, from enforcing its police powers for the protection of life and property, by requiring the bridge to be raised or wholly removed from the river. The state has a right to interfere with the maintenance of a dangerous bridge across a public highway, so far as is necessary for the public protection.

The allegations as to the refusal of the city to change the grades of the street are not a valid defense.

The Railway Company has not alleged any demand *by it* upon the city of Kansas City to either enact an ordinance for the change of the grade of the streets referred to in its answer, or for permission to elevate its tracks by the construction of an embankment, trestle or viaduct along or over said streets. The allegation, that the city "has not raised the grades of any of its said streets upon which said approaches rest and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by

the defendant *if* the height or elevation of its said railway bridge is increased in accord with the demand of the plaintiff herein; and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said street," does not amount to an allegation *that the Railway Company has demanded* and been refused permission to reconstruct the approaches to its bridge.

> "The respondent in his return or answer must state the facts relied upon by him with certainty. Nothing is to be left to inference." 13 Enc. of P. & P. 716.

In High's Extraordinary Legal Remedies, Sec. 472, it is said:

> "No principle of the law of mandamus is better settled than that an argumentative return be like any other argumentative pleading is bad. The facts relied upon should be set forth clearly and positively *and not by way of argument or inference.* In other words, facts should be stated and not mere conclusions or inferences from facts, since a defective or incomplete statement of facts will not be aided or supplied either by intendment or inference. *Nor will the necessary facts which are not stated be inferred or intended from the facts actually set forth.* And a return is faulty which states mere conclusions of law without stating the facts so that the court may judge of their sufficiency."

The Railway Company does not appear from the record to have any franchise or rights to use any of the public streets of Kansas City.

The laws of Kansas require a railway company to procure the consent of the city to the construction or maintenance of railway tracks on public streets. The defendant company does not allege that it has any franchise or license at this time

to occupy any public street of the city of Kansas City, Kansas. The record does not show, but it may be true, that the franchise or license of the company to occupy the public streets of Kansas City, Kansas, has expired.

The harbor line map (of which the District claims this Court may take judicial notice) shows that it is several hundred feet from the river to the nearest street from the bridge in controversy. Before the plaintiff can complain with reference to inaction on the part of either the District or the city with reference to the changing of grade it ought to allege *that it has some rights with reference to the occupation or use of the public streets for its railway tracks*, and in the absence of such allegation, this Court does not warrant it in assuming that the Railway Company has any right to use or occupy any public street of the city of Kansas City, Kansas, particularly in view of the fact that the defendant company in its answer alleges that the "streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas." *The answer is in its effect an admission that the defendant has no rights on the public streets of Kansas City.*

In this connection, the Court's attention is called to the seventh subdivision of Section 3006, Gen. Stats. 1909, which authorizes the Drainage District to change the grade or elevation of all public highways or railroads at points where its levees cross or intersect the same.

This Court will take judicial notice that under the provision of Chapter 172 of the Laws of Kansas, 1911, and the proclamation of the governor of Kansas, of date February 3, 1911, the state appropriated to the use of the Drainage District all the land between the harbor lines and a strip of land 40 feet wide landward therefrom, said 40-foot strip being appropriated as set forth in said proclamation for the construction and maintenance of levees.

The Railway Company does not allege willingness to raise its bridge.

The alleged refusal of the city to change the grades of the streets upon which the Company's approaches to its bridge are constructed, does not appear from the answer to have been given in reply to any demand from the Railway Company, and even if the Railway Company had made such a demand upon the city and the same had been refused, it would be wholly immaterial, *unless the Company alleged its willingness to elevate its bridge.* As a foundation for a defense alleged, it would be necessary for the Company to allege its willingness to raise the bridge as required by the order of the District.

The defense that the city will not consent to a change of the grades of the streets is inconsistent with the position assumed by the Railway Company in its answer. As the Supreme Court of Kansas properly observed, if the Company was seeking to raise its bridge, it would doubtless without difficulty obtain consent to make any necessary or proper alterations in its approaches from the city or the Drainage District, or both.

In conclusion on this point, it cannot be inferred from the answer that the Railway Company is willing to raise its approaches or has requested permission from either the Drainage District or the city so to do, and it must be assumed that the officers of the Drainage District and the city, will or have consented to such alterations in the approaches of the Company to its bridge, as are necessary to enable it to continue the use thereof, especially if it has any rights on the streets.

The allegation that the District (paragraph 19 of answer) has no power or authority to order the raising of the bridge or the clearing of the channel is not a statement of any facts constituting a defense, but is a conclusion of law and an erroneous one as well.

As is said by the Supreme Court of California in *Ohm* v. *San Francisco*, 92 Cal. 437:

> "A conclusion of law in a pleading, so far as it is correct, is useless, and when erroneous it is worse than useless, and in either case it will be treated as if not alleged, in considering objections to the pleadings raised by demurrer."

The statutes of Kansas invest the District with plenary power to represent the state of Kansas as to the river and defendant's bridge.

The 4th, 5th and 9th sub-divisions of Sec. 3006, Gen. Stat. 1909 of Kansas are as follows:

> "*Fourth.* To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to so widen, deepen, establish, regulate and maintain the channels thereof, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *
>
> *Fifth.* To prescribe, regulate and fix the height of the superstructures above the water, the length of all spans and the location of the piers of all bridges across water courses situated in the district.
>
> *Ninth.* To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing *or maintenance* in any natural water course of any *unauthorized bridge*, embankment, pier or other work or structure constituting to any extent whatever an obstruction to the flow of the water. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *"

The submission by the Railway Company of plans to the War Department for the rebuilding of its bridge for approval is not a defense to this suit.

The Railway Company does not allege that it has submitted to the Chief of Engineers or Secretary of War of the United States any plan or request for permission to elevate or raise its bridge *in accordance with the notice of the Drainage District involved in this suit.* Sec. 9 of the Act of Congress of March 3, 1899, 30 Stat. at Large, p. 1151, 6 Fed. Stat. Annot. 805, is as follows:

> "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided*, that such structures may be built under the authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced; *And provided further, that when plans for any bridge or other structure have been approved* by the Chief of Engineers and of the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The Railway Company does not allege that plans for the construction of its bridge were ever submitted to the Chief of Engineers or Secretary of War. *Such an allegation was*

necessary in order to show that its bridge is a lawful structure. Such an allegation is necessary in order to make the proviso of said act prohibiting deviation from bridge plans approved by the War Department, applicable to this case. The language of the statute is that "when plans for any bridge or other structure have been approved by the Chief of Engineers and Secretary of War, it shall not be lawful to deviate from such plans either before or after the completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and Secretary of War."

By the 9th subdivision of Sec. 3006, Gen. Stat. of Kansas 1909, above quoted, the Drainage District is empowered to enjoin the maintenance of "unauthorized bridges" "and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such."

Before the Company can rely on this statute, it must bring itself within its terms and must also allege that it has asked the consent of the Chief of Engineers and Secretary of War to make the change in its bridge required by the Drainage District. The purpose of the statute above quoted is to prevent obstructions to the free navigation of water ways. The judgment of the Supreme Court of Kansas is for the removal of all obstructions to an elevation of 340.26 feet. This judgment promotes the objects of the statute and is in entire harmony with it. There is nothing in this Federal statute which makes it unlawful for the Railway Company to perform the judgment of the Supreme Court of Kansas in this case.

The Supreme Court of Kansas in its decision held:

> "The plaintiff board cannot compel the elevation of bridges in question until reasonable plans therefor are approved by the proper federal authorities."

This paragraph of the court's decision is not to be construed as constituting a defense to the right of the District to compel the elevation of the Railway Company's bridge. It simply recognizes the concurrent jurisdiction of the United States and the state of Kansas over the river. When a writ is issued upon the judgment, proper provision can be made therein exempting the Railway Company from performance thereof, if the Railway Company cannot secure the consent of the War Department to the elevation of its bridge 340.26 feet. A similar question arose in case of *People* v. *Board of Sup'rs*, 142 N. Y. 217, 36 N. E. 1062, an action of mandamus to compel the rebuilding of a bridge over a navigable stream; that court decided:

> "It is no reason for refusing mandamus to the board to build a bridge that before construction can be begun, the location and plans therefor would be approved by the Secretary of War."

In that case it was said the objection that under Sec. 7 of Chapter 1907, the Act of Congress passed Sept. 19, 1890, the Board of Sup'rs cannot proceed to construction of the bridge until the location and plans shall have been approved by the Secretary of War, may excuse them in a proceeding for contempt, *in case it appears that such consent has been sought in good faith and cannot be procured. We think the existence of this statute does not justify inaction and the matter can be provided for in the peremptory writ.*

The allegation that the order or demand of the District for the elevation of the bridge to 340.26 feet and the clearing of the channel is "unreasonable, illegal and arbitrary" does not put in issue the reasonableness of the order.

The pleadings presented no issue as to the necessity for or the reasonableness of the District's demand that the bridge be raised and the old bridge, its superstructure, piers, piling and wreckage removed from the channel.

The law of Kansas required the Railway Company to state the facts constituting its defense. If the Company desire to raise an issue of fact as to whether the elevation of its bridge six and one-half feet was necessary to protect the Drainage District against overflows, it should have alleged that a channel of less capacity that required, stating the facts of its contention. The conclusion of the Company that the District's demand is "unreasonable, illegal and arbitrary and beyond the power of said plaintiff to make," must be assumed to be because of the things theretofore alleged in its answer. The words "unreasonable," "illegal" and "arbitrary" as used in the answer do not constitute a statement of any fact or new matter of defense. They merely state a conclusion or opinion of the pleader. They do not amount to an allegation of mistake, fraud or misconduct on the part of the District's Board of Directors.

Justice Valentine, delivering the opinion of the Supreme Court of Kansas in *Stratton* v. *McCandless*, 37 Kan. 296, p. 305, said:

> "General allegations, such as are generally denominated conclusions of fact, conclusions of law or inferences, should not be considered as of any value, except in connection with the detailed statement of the facts."

See also *Byington* v. *Com'rs*, 37 Kan. 654.

In Merrill on Mandamus, Sec. 280, p. 345, it is said:

> "Though the mandatory part of the writ may be very general, yet the return must be very minute in showing why the respondent has not obeyed the order, and it

should contain positive allegations of fact and not mere inferences from facts."

At Section 274, Merrill on Mandamus, it is stated:

"The respondent is called upon to answer to the writ, and he must confine his traverses to the statements therein contained. *He cannot answer the writ by his legal inferences from facts not stated. The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.*"

If the Company had alleged the capacity of the channel at its bridge as now constructed and facts showing such channel to be adequate to prevent overflows, the question would then arise as to whether or not evidence in support of such allegations (in view of the District's express legislative power to determine the elevation of bridges) was admissible. As the answer stands no such question is presented. The Supreme Court of Kansas was right in assuming that there was no issue of fact as to the reasonableness of the demand of the District for the elevation of the bridge six and one-half feet.

Neither the order of the District nor the judgment of the Supreme Court of Kansas deprives the Company of its property without due process of law, nor deny to it the equal protection of the laws, nor constitute a taking of its property for public use.

DECISIONS APPPLICABLE TO THIS CASE.

Railway companies are required by the statute and common law of Kansas as well to construct and maintain bridges so as not to impair the usefulness of navigable rivers.

Sec. 1763, Gen. Stat. 1909, relating to railroads in the state of Kansas, provides:

> "To construct its road *across*, along or upon *any stream of water, watercourse*, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; *but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness.* Nothing herein contained shall be construed to authorize the construction of any railway, not already located in, *upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city.*"

In *Union Trust Co.* v. *Cuppy*, 26 Kan. 754, the Supreme Court of Kansas, construing the statute relating to the construction of railroads over streets and watercourses, held:

> "That a railroad company in constructing its road over a natural watercourse is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times), which may reasonably be expected to flow through such watercourse."

The Supreme Court of Kansas has followed the decisions of this Court. In its opinion (87 Kan. 272) (pages 17 to 25 of Record) it says:

"There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and *State* v. *Missouri Pacific Railway Company*, 33 Kan. 176, *Burlington, etc., Railroad Company* v. *People*, 77 Pac. 1026, are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper, for the reason that the viaducts sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which co-operation could not be compelled. Here the two defendants only are proceeded against, each

separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities, is no sufficient reason for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in *Balch* v. *Glenn*, 85 Kan. 735 (p. 740):

'Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state.'

Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public' (p. 743). But in this case the parties are corporations formed for a *quasi* public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon

the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

'The expenses that will be incurred by the Railroad Company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the Company.' (*Chicago, Burlington, etc., Railroad* v. *Chicago*, 166 U. S. 226.)

Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

'It is the duty of the Railway Company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws.' (*C. B. & Q. Railway* v. *Drainage Comm'rs*, 200 U. S. 561.)

In the case just cited the court quoted with approval an expression of the Supreme Court of Illinois that the implied authority of the Company to build its present bridge was coupled with the common law duty 'to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use' (p. 587).

In *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after

the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such repairs could be required by mandamus. The court said (p. 595):

'We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement.'

'But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety' (p. 589). The Eighth Circuit Court of Appeals in *Chicago B. & Q. R. Co.* v. *Board of Sup'rs*, 182 F. 291, held that:

'A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established.'

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed *that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties*, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of the unreasonable hostility to the orders of this court or to the welfare of the people comprising the

Drainage District, and it cannot be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, *it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas river all obstructions of every kind where their lines cross such stream,* the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis Directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis Directrix."

In *C. B. & Q. Rly. Co.* v. *Illinois*, 200 U. S. 561, it was decided:

"The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.

The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, *does not amount to a taking* of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution.

The equal protection of the laws guaranteed by the Federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, to effect the drainage of low lands."

The court in its opinion said:

"The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen, and widen the waterway over and across the company's right-of-way across Rob Roy creek.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. *If the injury complained of is only incidental to the legitimate exercise of*

governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, *although they may interfere with the full enjoyment of private property, and though no compensation is given.*' Sedgw. Stat. & Const. Law 434.

Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

In *C. B. & Q. Rld. Co.* v. *Board of Sup'rs*, 182 Fed. 291, the Circuit Court of Appeals for the Eighth Circuit decided:

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

At pages 294-295 of the opinion, the court says:

"The duty of the railroad to conform its roadbed to the requirement of such public easements as highways and ditches is an incident of its right to construct and maintain its road. The whole subject has been clearly defined in the long line of cases in which railroads have been charged with the expense not only of building fences along their right-of-way, and cattle guards, but also with the expense of constructing crossings over new highways, both public and private, and also with the expense of constructing bridges and viaducts so as to obviate crossings at grade whenever the public welfare required such a change. It has been uniformly contended by the railroads that such expenses constituted a taking of their property for public use without just compensation, a deprivation of their property without due process of law, and a denial to them of the equal protection of the law. While there has been some conflict in the decisions, the overwhelming weight of authority at the present time is that such requirements are just, and are not subject to either of the constitutional objections mentioned."

At pages 297-298, the court further said:

"These crossing cases come much nearer to violating the constitutional rights of railroads than does the uncompensated intersection of a public drain. They compel the railroad not only to maintain its road over the highway, but also to construct, often at great expense, a safe passageway for the sole use of the traveling public. * * *

To hold that the public must bear the expense of constructing the bridges in question is not to compel them to pay for something which they have taken in constructing the ditch, but is to impose upon them the burden of constructing and maintaining the plaintiff's roads at the point of intersection. A more reasonable view is that declared by the courts, whose decisions we have quoted, that a railroad corporation takes its franchise authorizing it to con-

struct and maintain its road, subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains. To require this does not deprive the company of its property without due process of law, or deny it the equal protection of the law, but simply charges it with the obligation of maintaining its own road.

The claim of the plaintiff in this case is peculiarly devoid of merit. It has maintained for years wooden trestles at the points where its lines are intersected by the drain. These structures are temporary and perishable. In their place it demands that permanent bridges, with spans and concrete abutments shall be built and maintained at public expense across the drain. That would not be compensation for injury to private property, but simple enrichment of the company out of the public treasury."

The argument of the court in the case above cited is applicable to the case at bar. The Railway Company's bridge lacks almost 200 feet of spanning the river. Its bridge is wholly within the channel. It seeks to compel the public to pay for removing a nuisance; to compel the public to build for it a new bridge and approaches thereto. The Drainage District simply asks that the Railway Company maintain its bridge at a reasonably safe elevation.

In *St. Louis S. W. Ry. Co.* v. *Miller Levee Dist. No. 2*, 197 Fed. 815, paragraphs 2 and 3 of the syllabus are as follows:

"A levee district having been expressly authorized by Act, Ark., March 3, 1911 (Sp. & Priv. Laws 1911, p. 89), to construct certain levees along the banks of Red river, in M. county, the fact that, on account of the construction of such levees, *the plaintiff railroad company, which had previously, at great expense, built a bridge across the river, may be compelled to change the same, at its own expense, in order to raise it above the new high-water*

mark resulting from the confinement of the waters by the levees, does not constitute a taking, appropriating, or damaging of the railroad company's property without compensation in violation of the Constitution of the United States or of the state of Arkansas.

The construction of a levee across a railroad's right-of-way under statutory authority, which could be constructed without interfering with the movements of complainant's trains, does not constitute an illegal interferance with complainant as an interstate carrier of freight, passengers, and mail."

The decision above cited was in a suit in equity by the railway company to restrain the levee district from constructing a levee above a certain height and across its right-of-way.

"The bill alleges in substance that the construction of a levee will compel the railway company to raise and reconstruct its bridge across Red river, and the approaches leading to the bridge, at an expense of $150,000, and that additional openings in its embankment will be rendered necessary, which will cost $100,000. The bill further alleges that the district, on account of the limitations on its taxing power, will not be able to pay the railway company the amount it will cost to make such changes.

The effect of the contention of the railway company is that having legally constructed its bridge and approaches under conditions then existing, at a height and in a manner warranted by the best engineering skill and foresight, it cannot now, by a change of conditions authorized and directed by the state, be put to the expense of raising and reconstructing its bridge and approaches. In other words, it having some years ago at great expense adjusted itself to conditions as they then existed, those conditions must remain unchanged unless it is compensated for the expense which a contemplated change will necessitate. As additional grounds for an injunction, the railway company alleges that it is an interstate carrier of freight, passengers, and the United States mail, and that,

as a result of the construction of the levee, its bridge will be rendered insecure and liable to be destroyed, thereby endangering the lives of its employes and passengers, and interfering with and retarding the carriage of the mail."

At page 823 the court, referring to the contention that the construction of the levee would constitute an illegal interference with interstate commerce, said:

"The injury to the railway company by the construction of the levee is not a taking of property in violation of the Constitution of the United States; nor is it a taking, appropriating, or damaging of property in violation of the Constitution of the state of Arkansas. Nor is the construction of the levee across the right-of-way of the railway company an illegal interference with it as an interstate carrier of freight, passengers, and the United States mail. The levee can be constructed across the right-of-way without interfering with the movement of trains. *The presumption is that it will be so constructed. It is within the power of the state to authorize the condemnation of a railway right-of-way for such a purpose. St. Louis & S. F. R. Co.* v. *Fayetteville*, 75 Ark. 534, 87 S. W. 1174."

In *C. B. & Q. R. Co.* v. *Board of Sup'rs*, 170 Fed. 665, the court in the second and third paragraphs of the syllabus decides:

"In Iowa Statute of 1904 (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorizes county boards of supervisors to create drainage districts and to drain lands and change natural water courses to promote the public health, convenience and general welfare, and which, as amended in 1907 (Acts 32d Gen. Assem. 1907, p. 100 c. 95) provides that any railroad company whose right-of-way shall be crossed by any drainage ditch or channel *shall not be allowed damages on account of bridging the same, is not*

unconstitutional as taking the property of the railroad company without compensation, the state having the right in the exercise of its police powers, for the purposes expressed in such act, to impose expense or burdens on property without the allowance of an equivalent by way of damages.

Under the Iowa Drainage Law (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorized the supervisors of a county to create drainage districts, to construct ditches or change water courses and to appoint commissioners to classify lands within such districts and assess the benefits, the findings of fact of such tribunals are conclusive, and their action can be reviewed by the courts only as to questions of law, and upon the question of the amount of benefits assessed, which by the express terms of the statute is reviewable on appeal."

In the opinion in that case at page 669, Judge McPherson, citing and quoting from the decisions of this Court in *C. B. & Q. Rld. Co.* v. *Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, and *C. B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, says:

"Whatever promotes the health, the safety, the convenience, and the welfare, limited to certain lines, is an exercise of the police power, for which property without compensation can be taken, and expense and burdens can be imposed without an allowance of the equivalent by way of damages. * * *

When a tribunal is empowered or directed to pass upon questions of fact, such findings are final and conclusive as to the facts, but not to matters of law. Therefore the findings of the engineer and board as to the necessities of a new channel, to the end that the public health, convenience, and welfare would be promoted, and as to the location and benefits, and depth and breadth of the new channel, are all findings of fact concerning which the courts can make no inquiry, much less review or set aside. *Ryan* v. *Varga*, 37 Iowa 78; *Slack* v. *Blackburn*, 64 Iowa 373,

20 N. W. 478; *Martin* v. *Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Commissioners* v. *Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Enterprise* v. *Zumstein*, 67 Fed. 1000, 15 C. C. A. 153; cases cited in *People's Bank* v. *Gilson*, (C. C.) 140 Fed. 1."

In *State* v. *M. & St. L. Ry. Co.*, 39 N. W. 153, the court decided:

"Mandamus proceedings against the Minneapolis & St. Louis Railway Company to compel it to bridge its tracks where they cross city streets, and to construct approaches to such bridges at one end of the same. The Manitoba Railway tracks cross the same streets so near to those of the other company as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over all the tracks of both companies. A like mandamus proceeding was pending against the Manitoba Company to compel it to construct those parts of the bridges over its tracks with approaches thereto. Both causes were required to be tried together. Held not to be error.

Charter of the Minnesota Western Railway Company (Sp. Laws 1853, c. 66) construed as imposing a continuous duty as to restoring public streets to usefulness, by bridging or otherwise, when necessary.

The fact that a railroad has once been lawfully constructed upon the grade of a street does not exempt it from bridging when that becomes necessary.

Mandamus proceedings may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted."

In the opinion at page 157-158, the court says:

"The fact that the respondent formerly laid its tracks, at a considerable expense, upon the grade of the streets, by the authority of the city council, does not exempt it

from the duty of bridging when the increased use of both the railway and of the streets render that necessary. *State* v. *Railway Co.*, 35 Minn. 131, 28 N. W. Rep. 3. *From the fact that the city has not yet changed the grade of these streets so as to conform to the plan of the proposed bridges it does not follow that this compulsory proceeding may not be maintained.* The city authorities had no power to compel these corporations to adopt a plan which they might deem best; and since, as has been decided, it could only be finally determined by judicial decision what the corporations should be compelled to do, it is obvious that any fixing of grade for these bridges, by the action of the city council prior to the decision of the controversy as to whether the corporations were under obligation to bridge the streets, and if so, how it should be done, would have been speculative, and subject to such changes as might become necessary as the result of the decision of the court. The authority of the court to determine the necessity, and the mode of carrying these streets over the tracks, necessarily involves the power to determine the elevation or grade of the bridges; and to this extent the power given by the city charter to the city council to establish and change the grades of streets must be regarded as qualified."

In *City of Emporia* v. *Rly. Co.*, 88 Kan. 611, it appeared that the city of Emporia sought by mandamus to compel the railway company to remove an embankment and carry its tracks upon a viaduct over a public street. The defendant claimed the ordinance was unreasonable, unjust and confiscatory; that it would involve an expenditure of $10,000 by it, without benefit to the city therefrom. *It was also claimed that the city had made no provision for the removal of a sewer which formed an obstacle to the construction of the subway,* and in conclusion it was claimed that by the ordinance, the defendant was deprived of its property without due process of

law, and denied the equal protection of the laws, contrary to the Constitution of the United States and amendments thereto.

In that case, as in this, the answer contained a general denial and alleged matters above mentioned, which it was claimed, rendered the ordinance void. *The plaintiff moved for judgment on the pleadings, and was awarded a peremptory writ of mandamus as in the case at bar.*

In the opinion at page 613, the court said:

> "The courts have no general supervisory power over the policy of municipal legislation. The extent to which the welfare of a city and of the traveling public will be promoted by opening a city street through a railway embankment which wrongfully obstructs it, leaving the railway tracks upon a viaduct, is not a judicial question. *The power of the city over the subject is legislative, and the courts can interfere in such cases only because of some constitutional impediment or lack of legislative authority on the part of the city, or because the conduct of the city is so arbitrary, capricious, unreasonable and subversive of private right as to indicate an abuse rather than a bona fide exercise of power.*"

IV.

The judgment is within the scope of the pleadings. The pleadings gave the Supreme Court of Kansas jurisdiction over the bridge and the river. The court had jurisdiction to order the raising of the bridge or its removal, or both.

The law gives the Supreme Court of Kansas original jurisdiction in mandamus. The motion and affidavit for the alternative writ, the alternative writ, and its service and the appearance of parties gave the court jurisdiction of this particular

case. The cause of this suit is the defendant's bridge; that bridge is the object or subject-matter of this suit. In both the motion and affidavit for, and the alternative writ, it is alleged:

> "That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed 'the Ohio bridge.' "
>
> "That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 340.26 feet above St. Louis Directrix *and to remove the old bridge, superstructure, abutments, piers, piling and wreckage.* That the said defendant has failed, neglected and refused so to do."
>
> "Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis Directrix *and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage;* that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper."

The allegations of the writ and the petition for it gave the trial court jurisdiction not only to consider the matter of raising the bridge, *but also invested the court with jurisdiction to order the removal of the "old bridge, superstructure, abutments, piers, piling and wreckage."* The prayer of the District was for a writ requiring the defendant to commence at once and proceed as rapidly as possible with the raising of its bridge

"and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage."

> "Jurisdiction of the subject-matter is obtained by the filing of such a pleading or petition as will bring the action within the authority of the court.
>
> It is not necessary that the pleading shall state a cause of action, or be so drawn as to withstand a demurrer, but it must be sufficient to show that the subject-matter of the action is within the jurisdiction of the court." (See Works on Courts and Jurisdiction, Sec. 11, p. 30, and 1 Bailey on Jurisdiction, Sec. 7, p. 6.)

The matter decided, to-wit, that the defendants remove from the Kansas River *"all obstructions of every kind and character" where its bridge crosses the stream and commanding the company to "clear such channel to a height of 340.26 feet,"* etc., was within the issue; was submitted for decision by the pleadings. The allegations relative to the removal of the old bridge and its parts is just as prominent and positive as the allegation as to the defendant raising its bridge. The Company had the opportunity to contest and did contest in the trial court the matter of removal of the old bridge and its parts. The Company *has had an opportunity to be fully heard* and has been heard by a competent court, as to the right of the District to recover the judgment rendered. The court having by the pleadings jurisdiction to render the judgment complained of by the Company, it necessarily follows that the judgment is an adjudication of all matters necessary to be decided in order to render such a judgment. In other words, it must be held that the Supreme Court found that there was no defense stated in the answer and that the material allegations of the writ, including the allegation that the District demanded the removal of the "old bridge, its superstructure, abutments and piers," were expressly admitted by the answer or by its legal effect.

The trial court was not bound to order the bridge raised. It could order such judgment as the facts shown by the pleadings and the law applicable warranted.

In Kansas a plaintiff recovers such judgment as the cause of action established entitles him regardless of his prayer. In mandamus under the Kansas statute, a plaintiff on motion for judgment over the answer is entitled to peremptory writ. In Kansas a peremptory writ may be allowed in the first instance. *If so, it could certainly be allowed after a hearing on the motion and affidavit set forth in the record.*

Sections 6313, 6314, 6317 and 6318 of the Kansas Code of procedure are as follows:

> "Sec. 6313. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, *a peremptory mandamus may be allowed in the first instance;* in all other cases the alternative writ must be first issued.
>
> Sec. 6314. The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, *or may grant the writ without notice.*"
>
> "Sec. 6317. If no answer be made, a peremptory mandamus must be allowed against the defendant; *if answer be made, containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objections to its sufficiency,* or may countervail it by proof, either in direct denial or by way of avoidance.
>
> Sec. 6318. No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, *and are to be construed, and may be amended, in the same manner as pleadings in a civil action;* and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

The Drainage District stated a cause of action for the raising of the bridge *and* the removal of the old abutments, piers and wreckage from the channel. The court granted only a part of the relief asked. It gave judgment for the removal of all "obstructions" to an elevation of 340.26 feet. This judgment does not prevent *but permits the raising or reconstruction of the bridge.* It does not command the defendant to raise the bridge to 340.26 feet. Only "obstructions" are required to be removed from the river.

Assuming that the Company cannot be compelled to reconstruct its bridge without its plans being first approved by the War Department, it does not follow that a peremptory writ cannot be issued compelling it to ask such assent or remove its bridge.

The case of *People* v. *Board of Sup'rs,* 142 N. Y. 217, 36 N. E. 1062, was an action of mandamus to compel the rebuilding of a bridge over a navigable stream. The court decides:

> "It is no reason for refusing mandamus to the boards to build the bridge that, before construction can be begun, the location and plans will have to be approved by the Secretary of War. (Act Cong., Sept. 19, 1890, c. 907, Sec. 7.)"
>
> * * * *
>
> "It is no reason for refusing the proper peremptory writ that the alternative writ asks too much, or not quite the right, relief."

In the opinion, at page 1064, the court says:

> "The alternative writ is now equivalent to the complaint in an action, and the demurrer and return stand as a demurrer or answer in an ordinary suit. If the substantial right is set out in the writ, the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled. The

court, in awarding the peremptory writ, may mold it according to the just rights of all the parties. (Code Civ. Proc., Secs. 2067, 2090; *People* v. *Nostrand*, 46 N. Y. 375; *People* v. *Dutchess & C. R. Co.*, 58 N. Y. 152; *People* v. *Wilson*, 119 N. Y. 515, 23 N. E. 1064.)

The objection that under Section 7 of Chapter 907 of the Act of Congress passed September 19, 1890, the boards of supervisors cannot proceed to construct the bridge until the location and plans shall have been approved by the Secretary of War may excuse them in a proceeding for contempt *in case it appears* that such consent has been sought in good faith, and cannot be procured. We think the existence of this statute does not justify inaction, and the matter can be provided for in the peremptory writ, if one shall be issued."

"The prayer in the petition for a mandamus may properly be disregarded, and the final order made to conform to the facts alleged and established."

Osage Valley & S. K. R. Co. v. *Morgan County Court*, 53 Mo. 156.

"The final order in mandamus need not conform to the prayer of the petition, *nor to the mandatory clause in the alternative writ*, but may be framed according to the facts established. *School Dist. No. 1* v. *Board of Education of Town of Lamar*, 73 Mo. 627."

"Where plaintiff in mandamus demands greater relief than he is entitled to on the facts stated in his affidavit, he will not thereby be precluded from obtaining less relief, to which he is entitled under the facts stated. *Smith* v. *Lawrence*, 2 S. D. 185, 49 N. W. 7."

In *Howard* v. *Huron*, 6 S. D. 180, 60 N. W. 803, page 104, the court said:

"We fully agree with the reasoning of the learned Supreme Court of Ohio in *State* v. *Crites*, 48 Ohio St. 142,

26 N. E. 1052. In that case the court says: '(4) The earlier doctrine in mandamus was that the peremptory writ should strictly follow the alternative one. That rule, in all its strictness, is still followed in many of the more modern cases. * * * Valid reasons for this rigid rule are not at all apparent. The civil remedy by mandamus is to enforce civil rights, and why the proceeding therein should not be as elastic as in civil actions has not been satisfactorily answered by the cases that adhere to the rule. In civil actions no one would be heard to contend, at this late day, that, because the plaintiff had claimed more than upon the trial he could maintain, it would be fatal to his right to recover that to which he was entitled upon the facts and the law as they appeared upon the trial. In mandamus is it so much less difficult for a party to determine in advance the exact measure of his rights, that if he makes a mistake in that regard, by claiming more than he can maintain upon the trial, he is to be sent out of court, mulcted in costs, and compelled to begin *de novo?* If he claims less than his right, no more than is claimed will be awarded him. If the rule should be maintained in all its strictness, the remedy of mandamus will be a perilous one to invoke in cases where more than a single act or right is sought to be enforced. If less than his full right is claimed by a party, he will not recover that not claimed, but must encounter the delay of another proceeding, and the hazard of a plea of *res adjudicata* in respect of it, while if he claims too much he will be denied any relief whatever, however clearly his title may appear to a large part of his demand. In many cases courts have sought to escape from the extreme severity of the rule—in some instances by holding the difference between the two writs to consist of immaterial matters of detail, while in others an amendment of the alternative writ was allowed, making it conform to the peremptory writ. *State* v. *Acting Board of Aldermen*, 1 S. C. 31; *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561; *State* v. *Baggott*, 96 Mo. 63, 8 S. W. 737; 2 Dill. Mun. Corp. (3d Ed.), Sec. 879. * * *

Treating the petition, and the alternative writ based upon it, as the foundation of the relator's claim, bearing

> the same relation to the proceedings in mandamus that the petition does to the proceedings in a civil action, and it is clear he is entitled to no relief beyond that which the petition and alternative writ show him entitled to, and if he wishes other relief he must, as in civil actions, set forth by an amendment the facts that establish his right to it; but where, upon the trial, he is able to establish by proof, or maintain in law his title to a part only of the relief sought, there seems now to be no reason for refusing to grant so much thereof as under the facts and law he is entitled to, without first amending the alternative writ."

In *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561, in the opinion the court says:

> "The statute allows amendments of the writ and answer as in case of pleadings in civil actions, and provides that the issues are to be tried and further proceedings had in the same manner as in civil actions. The proceeding is therefore now so elastic that the peremptory writ need not precisely follow the alternative one, *but the court, upon the hearing, may grant the relief in any form consistent with the case made by the complaint, and embraced within the issues.* *State* v. *Railway Co.*, 39 N. W. Rep. 153; *People* v. *Railroad Co.*, 58 N. Y. 152."

In *Gunn* v. *Lauder*, 10 N. D. 389, 87 N. W. 999, the court, at p. 1005, says:

> "It is further true that the ancient and stricter rule in mandamus has been relaxed by modern adjudications, under which a final writ 'may be in any form consistent with the case made by the complaint presented, and embraced within the issues.'"

In *School District* v. *School District*, 78 Pac. 690, the Supreme Court of Colorado decided:

> "That mandamus commanding the school district to pay the amount of claims which had been subsequently ascertained, from the funds realized from the levy of 1903, should be denied, but the district should be compelled to certify a special levy to the city council to meet such claims, or to include such a levy in its certificate of the 1904 levy for ordinary purposes."

In the opinion the court, citing *Ralls Co.* v. *U. S.*, 105 U. S. 733, says:

> "It does not follow, however, that petitioners are not entitled to any relief under the facts of this case, although they are not entitled to that which was awarded. Under the ancient practice a peremptory writ of mandamus could not be amended, and must issue in the same form as the alternative writ. The provisions of our law in relation to mandamus in the *nisi prius* courts are found in a chapter of the Civil Code, and there is no reason why the liberal rules of procedure and amendments governing other civil actions instituted thereunder are not applicable to a proceeding in mandamus. In these two applications under consideration the proceeding was by petition supported by affidavit and written notice to the respondents, and no alternative writ was issued. Upon a hearing had under issues of fact, the peremptory writ was the first one issued. We do not consider it fatal to petitioners' application that alternative relief was asked for, although there are decisions to the effect that a writ cannot go in the alternative. In *State* v. *City of Milwaukee*, 22 Wis. 398, the doctrine was announced that the mandatory clause of the writ should expressly state the duty required of the defendant. There the command was that the defendant pay the judgment mentioned, *or issue bonds for its payment, or proceed and levy a tax therefor.* It was held that these acts are distinct in

their nature, and that defendant may not know which to perform. A motion to quash the writ was sustained, but leave was given to relator to amend the writ if it desired to do so, for it was held that the writ was amendable. *In Ralls County Court* v. *U. S., 105 U. S. 733, 26 L. Ed. 1220, where the command of the writ of mandamus was to pay from money already raised, or levy a tax to raise more, it was held that a writ thus issued in the alternative was proper.* However that may be, we are satisfied that, where no alternative writ issued, but the peremptory writ was the only one allowed, if the granted relief was not proper, still, if the petitioner or relator is entitled to some kind of relief which was included in his prayer, he should receive it, and the necessary amendments in pleadings and processes may be made to conform thereto. The modern authorities sustain this conclusion. Merrill on Mandamus, Sec. 294; *State* v. *Supervisors*, 20 Wis. 79, 84; *People ex rel.* v. *Supervisors*, 27 Cal. 655, 684; *People ex rel.* v. *Supervisors*, 142 N. Y. 271, 278, 36 N. E. 1062; *Odendahl* v. *Russell*, 86 Iowa 669, 53 N. W. 336; *Dew* v. *Judges of Sweet Springs*, 3 Am. Dec. 639; 13 Enc. Pl. & Pr. 751 *et seq.*"

In conclusion, the Drainage District submits that an examination of the record shows that the Railway Company in its brief and argument has overlooked or misapprehends the legal effect of the pleadings upon which the judgment complained of is based, and that the decision of the Supreme Court of Kansas appears from the record to be correct.

Wherefore, the defendant in error prays:

First. That this appeal be dismissed for want of jurisdiction.

Second. That if such relief be not granted, the judgment of the Supreme Court of Kansas be affirmed, and that the plaintiff in error have all other proper relief.

T. A. POLLOCK,
Attorney for the Kaw Valley Drainage District of Wyandotte County, Kansas, Plaintiff in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 314.

THE KANSAS CITY TERMINAL RAILWAY COMPANY
PLAINTIFF IN ERROR,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 27, 1912.

(23,310)

(23,310)

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Be it remembered, That on the 9th Day of February 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas an Affidavit and Motion for a Writ of Mandamus, which are in words and figures as follows, to-wit:

2 In the Supreme Court of the State of Kansas.

Filed Feb. 9, 1912. D. A. Valentine, Clerk Supreme Court.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Affidavit and Motion for a Writ of Mandamus.

Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the court:—

That the plaintiff The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant The Kansas City Terminal Railway Company is a corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the statutes of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas River within said District, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Belt Line bridge".

That heretofore and by virtue of the power in it vested, the
3 plaintiff on or about the 18th day of April, 1911, notified the defendant to raise its said bridge 4.96 feet or to the required height of 342.73 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 342.73 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels being duly sworn on oath says that he is the President of the Board of Directors of The Kaw Valley Drainage District Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a writ of mandamus and that the matters and things therein stated and set forth are true.

And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridge without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossible to try said cause in the District Court of Wyandotte County and secure a hearing upon
4 an appeal within time so that said bridge could be raised before the anticipated rise in said river next June and July.

And further affiant saith not.

W. H. DANIELS.

Subscribed and sworn to before me this 8th day of February, 1912.
[SEAL.] MADELON DEROCHE,
Notary Public.

My Commission expires Jan. 11-1916.

(Endorsed:) The Kaw Valley Drainage District Wyandotte Co. Kan. Plaintiff, vs. The Kansas City Terminal Ry. Co. Def't. Motion for alternative Writ of Mandamus & Affidavit of Jurisdiction. Filed Feb. 9 1912. D. A. Valentine, Clerk Supreme Court.

5 And also on the said 9th day of February, 1912, the same being one of the regular judicial days of the January term, 1912, of the Supreme Court of the State of Kansas, before the said court in session at the Supreme Court Room in the City of Topeka; the following proceedings among others was had, and entered of record as follows, to-wit:

6 In the Supreme Court of the State of Kansas.

Friday, February 9, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN R'L'Y CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Allowing Petition for Alternative Writ of Mandamus.

Now comes the plaintiff herein by C. W. Trickett its attorney, and presents its verified petition for an alternative writ of mandamus herein; and thereupon after due consideration by the court, it is ordered that the alternative writ of mandamus issue to the defendants as prayed for in such petition, returnable on Tuesday, February 20, 1912, at 9:30 o'clock, A. M.

7 And also on the 17th day of February, 1912, there was filed in the office of the X Clerk of the Supreme Court of the State of Kansas, a stipulation extending the time of the defendant in which to make their return and answer to the alternative writ, which is in the words and figures as follows, to-wit:

8 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated by and between the parties hereto and their attorneys, that the defendant shall have ten days from and after

Tuesday, February 20, 1912, within which to make return to the alternative writ in the above entitled cause.

KEPLINGER & TRICKETT,
S. W. MOORE &
O. L. MILLER,
Att'y- for Defendant.

(Endorsed:) 18065. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District, Wyandotte County, Kansas, Plaintiff, vs. The Kansas City Terminal Railway Company, Defendant. Stipulation. Allowed this 17th day of Feb. 1912. W. A. Johnston, Chief Justice. Filed Feb. 17, 1912. D. A. Valentine, Clerk Supreme Court. S. W. Moore & Miller & Miller.

9 And afterward and on the 17th day of February, 1912, the same being one of the regular judicial days of the January term 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among others was had, and remains of record as follows to-wit:

10 In the Supreme Court of the State of Kansas.

Saturday, February 17, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Stipulation.

On stipulation it is ordered that the defendant be allowed ten days from February 20, 1912, within which to make return to the writ of mandamus.

11 And also on the 1st day of March, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the answer and return of the defendant to the alternative writ, which is in the words and figures as follows, to-wit:

12 In the Supreme Court of the State of Kansas.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas River within the Drainage District, which is usually termed the "Belt Line Bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the State of Missouri, and is a resident and citizen of said State of Missouri and not a resident or citizen of the State of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the State of Missouri and from states other than Kansas to and into
13 Wyandotte County and State of Kansas, and from Wyandotte County in the State of Kansas to the State of Missouri and to states other than the State of Kansas.

That the defendant's railway tracks extend from Jackson County, State of Missouri, into and through Wyandotte County and State of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the State of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States

and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the State of Missouri extend to and into Wyandotte County, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein and usually called the Kansas City Belt Railway Bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Kansas City Belt Railway Bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

14 Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas River 4.96 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas River since it will be unable to either go on to or off of said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any

15 change whatever in the grades of its said streets.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance

will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and its compliance therewith would require either a total destruction of defendant's business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto if permitted will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

The defendant further says that the plaintiff ought not to have or maintain this action against this defendant for the following reasons:

That at the time of making and entering into the contract hereinafter mentioned, the Kansas City Belt Railway Company
16 was the owner of the railway tracks now owned by this defendant and connected its line of railway in Kansas City, State of Missouri, with its line of railway in Wyandotte County, Kansas, by a temporary bridge across the Kansas River upon the same site now occupied by the railway bridge mentioned in the writ herein and known as the Belt Line Bridge.

That at the time of executing the contract hereinafter set out, said Kansas City Belt Railway Company and the plaintiff herein were in litigation in regard to such bridge and other matters connected with the proposed change in the Kansas River.

That the said plaintiff and said Kansas City Belt Railway Company being desirous of terminating all controversies in regard to the bridge in question, on the 28th day of May, 1907, entered into a contract in writing of the following import and effect:

It was by said parties mutually agreed that the Kansas City Belt Railway Company, in such contract called "the Belt Company," is and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw River to replace the temporary structure, and for that purpose has prepared plans for such permanent bridge duly approved by the chief engineers of the United States Army and by the Secretary of War.

That the Belt Company desiring to construct said permanent bridge at once, without waiting for the termination of suits pending between the said parties, the Belt Company and this plaintiff agreed to compromise and settle their differences upon the following terms and conditions:

The Belt Company agreed that it would proceed with all practicable speed to construct a permanent bridge across the Kaw River where its temporary bridge was then located, upon and in accordance with plans as shown by a blue print attached to said contract. It was further agreed in said contract that said bridge might be if desired a double deck bridge, that the east abutment of said
17 bridge should be placed upon the east harbor line as heretofore established by said Drainage District and as indicated upon the map of Messrs. Tuttle & Pike, engineers of said Drainage Board. That the west pier of the bridge as shown upon the blue print should be connected with the west bank of the Kaw River by such means, open trestle or other open work, as the Belt Company may elect; but it was further agreed that if at any time hereafter the Drainage District acting under legal authority shall establish a harbor line west of said west pier, then the Belt Company agreed to build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established, and it was further agreed in said written contract that

"The Drainage District hereby consents to the construction of said permanent bridge as provided for in the foregoing paragraph and declares that the same when constructed shall constitute a lawful structure at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter establish."

A true copy of said written contract with a true copy of the blue print which was attached thereto are hereto attached marked exhibits "A" and "B" and made a part of this return.

Defendant further says that said plan and blue print attached to said written contract showed and fixed by both words and figures the height at which said permanent bridge should be constructed, and that both parties to said contract were well and fully advised as to the height which said plans showed and said contract fixed for said permanent bridge.

Defendant further says that pursuant to such contract with the plaintiff, said Belt Company did immediately proceed to construct its said permanent bridge, and with all possible dispatch completed the same at an expense of many thousands of dollars; that said permanent bridge was constructed in exact accordance with the plans and blue print attached to said written contract and to the
18 height therein fixed, and such permanent bridge is the bridge mentioned in the alternative writ herein as the Belt Line Bridge, and which this plaintiff is now seeking to require this defendant to raise 4.98 feet by this proceeding.

Defendant further says that after the making of said contract and after the construction of said Belt Line Bridge this defendant by

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purchase became the owner of all the tracks theretofore belonging to the Kansas City Belt Railway Company and of said Belt Line Bridge, and has succeeded to and now possesses all the rights and interest, both legal and equitable, formerly possessed by said Kansas City Belt Railway Company in and to said property and under said written contract.

Defendant further says that since the execution of said written contract and the construction of said Belt Line Bridge in accordance therewith, no changes have occurred upon said river or in relation to the flow of water therein or in the surroundings of said bridge, no public necessity has arisen which did not exist and was not well known to the plaintiff to exist at the time said contract was executed and said bridge was constructed which rightly and legally require or make necessary a different height for such bridge from that which was fixed in said contract and at which said bridge was constructed.

Defendant further says that if the plaintiff shall now be permitted to require this defendant to raise and reconstruct its said railway bridge in accord with the demand in the petition and writ herein, such action will be in violation with the terms of plaintiff's said written contract. Such act upon the part of the plaintiff has no legal justification based upon any changed conditions as an act of public necessity, and the damage to this defendant necessarily resulting from such unwarranted and illegal demand of the plaintiff will amount if permitted to a sum exceeding $500.00 *thousand* dollars.

That if such demands of the plaintiff shall be permitted and its orders that the defendant be required to raise its said rail-
19 way bridge 4.96 feet above its present height be enforced, then such orders and enforcement are and will be illegal, wrongful, and in violation of the rights of this defendant under Section 12, of Article 1, of the Constitution of the United States prohibiting the impairment of obligations of contracts.

Defendant further says that the plans of the bridge mentioned in the writ herein across the Kansas River, a navigable river wholly within the State of Kansas, showing the full detail of the construction thereof including the height of the same, were duly presented to and duly approved by the chief of engineers of the United States Army and the Secretary of War before the construction thereof was commenced. That said bridge was constructed in accord with the plans so submitted and approved.

Defendant further alleges that the plans for the modification of said bridge according to the demands of the plaintiff as set out in the petition and writ herein, have not been submitted to or received the approval of the chief of engineers of the United States Army or the Secretary of War, as provided in act of the Congress of the United States of March 3, 1911, being Chapter 425, Section 9 of 39 Statutes, page 1151, and any deviation or modification of the plans of said bridge and any change therein without such submission and approval by the chief of engineers and the Secretary of War, will be unlawful, and any order or demand made by the plaintiff requiring changes to be so made in defenadnt's bridge with-

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out first obtaining the approval of the chief of engineers and the Secretary of War, violate the laws of congress in relation thereto and are nugatory and void, and the defendant cannot comply with the demands of the plaintiff as set out in the writ herein without violating the national law above referred to.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

S. W. MOORE,
S. W. SAWYER,
O. L. MILLER,
Attorneys for Defendant.

[Endorsed:] Copy. Supreme Court. # 18,065. Kaw Valley Drainage District vs. K. C. Terminal Ry. Co. Return and Answer of the Defendant to the Alternative Writ. Filed —— ——.

20 STATE OF KANSAS,
County of Wyandotte, ss:

O. L. MILLER being duly sworn says he is one of the attorneys for the defendant in the above entitled action and is authorized to make this affidavit.

That he has read the foregoing return and answer and knows the contents thereof, and that the statements therein made are true as he is informed and verily believes.

O. L. MILLER.

Subscribed and sworn to before me, a notary public in and for Wyandotte County and State of Kansas, this 29th day of February, 1912.

[SEAL.]

W. E. NELSON,
Notary Public.

My commission expires Sept. 30th, 1912.

(Here follows map marked page 21.)

MAPS

TOO

LARGE

FOR

FILMING

22 Agreement, Made this 28th day of May, 1907, between Kaw Valley Drainage District, of Wyandotte County, Kansas, hereinafter called the Drainage District, party of the first part, and The Kansas City Belt Railway Company, a corporation organized and existing under the laws of the States of Kansas and Missouri, hereinafter called the Belt Company, party of the second part, witnesseth that:

Whereas, the Belt Company owns and operates a line of railway extending from Jackson County, Missouri, into Wyandotte County, Kansas, and crossing the Kaw River by a temporary bridge which is claimed to be within the limits of the Drainage District, said temporary bridge being one constructed and now used by the Belt Company to replace the permanent bridge destroyed in the flood of June, 1903; and

Whereas, the Drainage District claims that it has the power and right under the laws of the State of Kansas to determine the width of the Kaw River where said bridge is located, and to prescribe the length and method of construction of bridges spanning the Kaw River within the limits of said District; and

Whereas, the Belt Company denies such right and power on the part of the Drainage District, and its trustee under its first mortgage has a suit now pending in the United States Circuit Court at Topeka, Kansas, against the Drainage District, the general object and purpose of which suit is to have declared null and void the laws of the State of Kansas under which the Drainage District has undertaken to act, and to have annulled and set aside the proceedings had and taken by the Drainage District wherein it has undertaken to act under such controverted powers, and to enjoin the Drainage District from issuing any bonds; and

23 Whereas, the Belt Company is, and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw River to replace said temporary structure, and for that purpose has prepared plans for such permanent bridge, and the same have been duly approved by the Chief Engineers of the United States Army and by the Secretary of War, but said plans are unsatisfactory to the Drainage District, and it has now pending a suit against the Belt Company to enjoin the construction of such permanent bridge in accordance with said plans; and

Whereas, The Belt Company desires to construct said permanent bridge at once, without waiting the determination of said suits or other litigation of a similar nature, and the parties hereto have agreed to compromise and settle their differences upon the terms and conditions hereinafter named:

Now, therefore, it is mutually agreed by and between the parties hereto as follows, to-wit:

1. The Belt Company agrees that it will proceed with all practicable speed to construct a permanent bridge across the Kaw River where its temporary bridge is now located upon and in accordance with plans as shown by the attached blue-print; that said bridge may be double deck double track bridge, if desired; that the east abut-

ment of said bridge shall be placed upon the east harbor line as heretofore established by the Drainage District, and indicated on the maps of Messrs. Tuttle & Pike, engineers of said Board, and now on file with the Secretary thereof, and marked by monuments upon the grounds, and the west pier, as shown upon said blue-print, which shall extend to bed-rock, shall be connected with the west
24 bank of the Kaw River by such means, by open trestle or other open work, as the Belt Company may elect, provided, however, that if at any time hereafter it shall be finally determined that the Drainage District, acting under legal authority, has established, or shall have established, a legal harbor line west of said west pier, and that the lawful width of said Kaw River shall exceed the distance between said east harbor line and said west pier, and that the Drainage District has the lawful right to require the construction of bridges for the full width of said river, and to cause the channel of said river to be widened to correspond therewith, and all unlawful obstructions to be removed therefrom, then the Belt Company agrees that it will build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established.

2. The Drainage District hereby consents to the construction of said permanent bridge as provided for in the foregoing paragraph, and declares that the same, when constructed, shall constitute a lawful structure, at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter establish.

3. If the power and authority of the Drainage District shall not be finally sustained and upheld as above provided, then this agreement shall be without prejudice to either of the parties hereto, and, in any event, this agreement, as between other persons, shall be without prejudice to the rights of the Drainage District and any person or corporation in respect to any litigation now pending or which may be hereafter brought.

25 In witness whereof, the parties have caused these presents to be duly executed the day and year first aforesaid.

[SEAL.] KAW VALLEY DRAINAGE DISTRICT,
By J. O. MILNER, *President.*

L. J. GILLIS, *Sec'y.*

THE KANSAS CITY BELT RAILWAY COMPANY,
By J. E. HURLEY.

Attest:
[SEAL.] C. C. RIPLEY, *Sec'y.*

[Endorsed:] Copy. Agreement between The Kaw Valley Drainage District and the Kansas City Belt Railway Company Concerning Belt Line Bridge.

26 [Endorsed:] 18065. In the Supreme Court of the State of Kansas. The Kaw Valley Drainage District of Wyandotte

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County, Kansas, Pl'ff, v. The Kansas City Terminal Railway Company, Def't. Return and Answer of Defendant to the Alternative Writ. S. W. Moore, S. W. Sawyer, A. L. Miller, Att'ys for Def't. Filed March 1", 1912. D. A. Valentine, clerk Supreme Court of Kansas.

27 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Writ of Mandamus.

The State of Kansas to the defendant, The Kansas City Terminal Company, Greeting:

Whereas it has been made to appear to us by affidavit in words and figures as follows:

Affidavit and Motion for a Writ of Mandamus.

Comes now the the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the court:

That the plaintiff The Kaw Valley Drainage District Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant The Kansas City Terminal Railway Company is a corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the statutes of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas River within said District, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Belt Line Bridge."

28 That heretofore and by virtue of the power in it vested, the plaintiff on or about the 18th day of April, 1911, notified the defendant to raise its said bridge 4.96 feet or to the required height of 342.73 feet above St. Louis Directrix and to remove the old bridge,

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superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 342.73 feet above Saint Louis directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper.

———, ———,

Attorneys for Plaintiff.

STATE OF KANSAS,
Wyandotte County, ss:

W. H. Daniels being duly sworn on oath says that he is the President of the Board of Directors of The Kaw Valley Drainage District Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a writ of mandamus and that the matters and things therein stated and set forth are true.

And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridge without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossible to try said cause in the District Court of Wyandotte County and secure a hearing
29 upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June and July.

And further affiant saith not.

———, ———.

Subscribed and sworn to before me this 8th day of February, 1912.

———, ———

Notary Public.

My commission expires Jan. 11, 1916.

Now therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Belt Line bridge over the Kansas River 4.96 feet or so that the lowest point of superstructure will be 342.73 feet above Saint Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on

the 20th day of February, 1912, at 10 o'clock A. M. of said day, and show cause by answer filed herein why you will not do so and have you then and there this writ with your return thereon showing that you have complied or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon the writ and answer is hereby set for the — day of February, 1912.

In witness whereof, this writ is signed by the Chief Justice and the Clerk of the Supreme Court of Kansas is ordered to attest the same, with the seal of court attached this 9th day of February, 1912.

W. A. JOHNSTON,
Chief Justice.

Attest:
D. A. VALENTINE,
Clerk Supreme Court.

(Endorsed:) 18065. Kaw Valley Drainage Dist. v. K. C. Terminal Ry. Co. Writ Mandamus. Original. Al Becker, Sheriff. By G. W. Westfall, Deputy.

30 *Sheriff's Return.*

STATE OF KANSAS,
County of Wyandotte, ss:

Received the within Writ of Mandamus Feb. 9 1912, and served the same in my County on the within named defendant, The Kansas City Terminal Railway Company, by delivering to G. C. Robinson, personally, he being yard clerk for and in behalf of said Company at its office and usual place of buisness in Kansas City, Wyandotte County, Kansas, the Original of which this is a true and certified copy on the 13th day of Feb. 1912.

AL. BECKER, *Sheriff.*
By G. W. WESTFALL, *Deputy.*

Service	$.50
Copy	.25
Mileage	.50
Total	1.25

31 And also on the 1st day of March, 1912, there was filed in the Office of the Clerk of the Supreme Court of the State of Kansas, a Stipulation to Hear Cause, which is in the words and figures as follows, to-wit:

32 In the Supreme Court of the State of Kansas.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed that the above entitled causes shall be set down for argument on law points on April 15th, 1912, at Chambers, or at such time thereafter as the Court can hear the same.

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.
S. W. MOORE,
S. W. SAWYER, &
O. L. MILLER,
Attorneys for Defendant Kansas City Terminal Railway Company.
S. W. MOORE,
JOHN G. SCHAICH,
O. L. MILLER,
Attorneys for Defendant The Kansas City Southern Railway Company.

(Endorsed:) No. 18065. No. —. The Kaw Valley Drainage District of Wyandotte County, Kansas, Plaintiff, vs. Kansas City Terminal Railway Company, Defendant. The Kaw Valley Drainage District of Wyandotte County, Kansas, Plaintiff, vs. The Kansas City Southern Railway Company, Defendant. Stipulation. Filed Mar. 23, 1912. D. A. Valentine, Clerk Supreme Court.

33 And afterwards and on March 23rd 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others, *was* had, and entered of record as afollows, to-wit:

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34 In the Supreme Court of the State of Kansas, Friday, March 22, 1912.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry of Advancement.

On stipulation of counsel for both parties and for good cause shown it is ordered that the hearing of this cause be advanced upon the dockets of this court, to the 5th day of April, 1912.

35 And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the Reply of Plaintiff to the Defendant's Answer and Return, which are in the words and figures as follows, to-wit:

36 In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Reply.

Comes now the plaintiff and for reply to the return and answer of the defendant to the alternative writ denies each and every allegation therein contained, and specifically denies that the City of Kansas City, Kansas, has refused to make changes in the grades of streets, and alleges that the defendant has never made any request to the City of Kansas City, Kansas, for such changes.

And plaintiff further alleges that under and by virtue of an Act of Congress commanding him so to do, the Secretary of War caused the Kansas River to be surveyed in the fall of the year 1909 and the fore part of the year 1910, for the purpose of establishing harbor lines and regulating and determining the height and length of bridges and on June 24th, 1910, established harbor lines and established the height and length of bridges, and promulgated said decree under and by virtue of said act and in said decree specified and named the bridge herein involved and decreed and ordered that said bridge be lengthened to the harbor lines and further ordered that it be raised to the height designated in the original writ of mandamus herein specified, and that compliance with said writ of mandamus would be an actual and exact compliance with the orders of the War Department, to the fraction of an inch, and not a violation of any order of said War Department.

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And plaintiff further says that under and by authority in it vested by the Legislature of the State of Kansas, it has investigated, taken evidence and determined that the height specified in the original writ herein issued was necessary for the purpose of preventing overflow and to protect lives and property of the people in said district and that the defendant herein had full knowledge thereof, said matter having been discussed with it and its engineers on numerous occasions, and plaintiff asks issuance of the writ of mandamus as originally prayed for.

37

KEPLINGER & TRICKETT,
Attorneys for Plaintiff.

(Endorsed:) No. 18065. Kaw Valley Drainage District vs. Kansas City Terminal Railway Co. Reply. Filed Apr. 2 1912. D. A. Valentine, Clerk Supreme Court.

38 And also on *on* the 5th day of April 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, Amendments to the Defendant's Answer and Return to the Alternative Writ, which are in the words and figures as follows, to-wit:

39 In the Supreme Court of the State of Kansas.

No. 18065.

KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS,
Plaintiff,
vs.
KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Amendments to Defendant's Return and Answer.

1. On the last page, at the end of the first paragraph of said answer and return, add the following words:

"And in violation of the Fourteenth Amendment to the Constitution of the United States."

2. In line six (6) of the last paragraph on the last page, change "1911" to "1899."

In line seven (7) of the same page, change "39 Statutes" to "30 Statutes at Large."

3. After the third paragraph on page three (3), add the following:

"That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon, would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, and the plaintiff has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor."

4. Just preceding the first paragraph on page four (4) add the following:

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"That defendant's tracks on the east side of said bridge are intersected by the tracks of The Atchison, Topeka & Santa Fe Railway Company, and on the west side thereof by the tracks of the Kansas City Southern Railway Company; that if said bridge is raised as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised, the tracks of said other lines of railway intersecting defendant's tracks would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; that the plaintiff has not arranged by voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised and that the owners thereof refuse to raise the same."

5. Just before the prayer on the last page, add the following:

"Plaintiff herein has no power or authority under the statutes of the State of Kansas, or otherwise, to require the defendant's bridge, which is now built and in use, to be raised."

S. W. MOORE,
S. W. SAWYER,
CYRUS CRANE, AND
O. L. MILLER,
Attorneys for Defendant.

Consent given to make above amendments to return and answer.
KEPLINGER & TRICKETT,
Att'ys for Pl'ff.

(Endorsed:) 18065. Filed April 5, 1912. D. A. Valentine, Clerk Supreme Court.

And also on the 5th day of April, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a motion of the plaintiff to withdraw *their* reply to the defendant's answer and return and for judgment upon the pleadings, which are in the words and figures, to wit:

In the Supreme Court of the State of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Comes now the plaintiff and asks leave of court to withdraw its reply, and moves for judgment on the pleadings.
KEPLINGER & TRICKETT,
Counsel for Plaintiff.

Endorsed: No. 18065. Kaw Valley Drainage Bd., Plaintiff, vs. K. C. Terminal Railway Co., Defendant. Motion of Plaintiff to withdraw Reply and for Judgment on Pleadings. Filed April 5, 1912. D. A. Valentine, Clerk of the Supreme Court.

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43 And thereafter and on the 5th day of April, 1912, the same being one of the regular Judicial days of the January Term, 1912, of the Supreme Court of the state of Kansas, in session at the Supreme Court Room in the City of Topeka, the following proceedings among others *was* had, and made of record, as follows, to wit:

44 In the Supreme Court of the State of Kansas, Friday, April 5, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

No. 18065

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Submission.

This cause comes on to be heard on the pleadings filed herein, consisting of the alternative writ of mandamus, the answer and return thereto, and the reply of the plaintiff; the defendants, The Kansas City Southern Railway Company, and the Kansas City Terminal Railway Company appearing by O. L. Miller and Cyrus Crane, their attorneys, upon application, are granted leave to file forthwith amendments to their answers and returns; the plaintiff, the Kaw Valley Drainage District of Wyandotte county, appearing by C. W. Trickett, one of its attorneys, upon application is given permission to withdraw the replies filed herein and to file motions for judgment on the pleadings, and to amend the alternative writ in the case against the Kansas City Terminal Railway Company, No. 18,065, as set forth in the written motion filed therein. And thereupon said causes are submitted upon the motions for judgment on the pleadings, on briefs for both parties, and after oral argument by counsel *and* taken under advisement by the court.

45 And thereafter, and on May 11th, 1912, the same being one of the regular judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court Room in the City of Topeka, the following proceedings among others, *was* had, and made of record, as follows, to-wit:

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46 In the Supreme Court of the State of Kansas, Saturday, May 11, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY CO., Defendant.

No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
THE KANSAS CITY TERMINAL RAILWAY CO., Defendant.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that judgment herein be entered in favor of the plaintiff and against the defendant, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the Saint Louis Directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the Saint Louis Directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $—, and hereof let execution issue.

47 And also on the said 11th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the opinion of the court in said cause, which is in the words and figures as follows, to-wit:

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48 No. 18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

v.

KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,

vs.

TKE KANSAS CITY SOUTHERN RAIWAY COMPANY, Defendant.

Original Proceedings in Mandamus.

Writs Granted.

Syllabus by the Court.

WEST, *J.:*

1. The Kaw Valley Drainage District in its work of clearing the channel of the Kansas River at and near its mouth and in prescribing the height of bridges over such stream is exercising the police power of the State, and has the right to require railroad companies to elevate their bridges to correspond with the height of levees constructed by the board, its determination that such elevation is necessary being prima facie bona fide and valid.

2. It is no defense to an action to compel such elevation that such requirement would entail upon the railroad companies large expense or force them into controversies with the city and other railroad companies respecting the raising of grades made necessary by such elevation. Their rights and franchises must be deemed to be held subject to the necessity of complying with all reasonable requirements which the legislature may make or authorize in the exercise of the police power of the state.

49 3. Such requirement does not by reason of the consequent expense and difficulty amount to a violation of the contract, commerce, due process or equal protection clause of the federal constitution.

4. The plaintiff board, having no power to abrogate its authority by contract, is not bound to refrain from requiring such elevation by reason of an agreement in 1907 to treat a certain bridge of lower elevation as lawful and sufficient; the party thus contracting with the board being required to know that such contract, if construed to prevent other and different requirements as conditions should remand them, was ultra vires.

5. The plaintiff board cannot compel the elevation of the bridges in question until reasonable plans therefor are approved by the proper federal authorities.

All the justices concurring.

A true copy.
Attest:

D. A. VALENTINE,
Clerk Supreme Court.

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50 The opinion of the court was delivered by

WEST, *J.*:

The Kaw Valley Drainage District prays for a writ of mandamus against the Kansas City Southern Railway Co., compelling it to raise its bridge across the Kansas river 6.5 feet, and to remove its old bridge, superstructure, abutments, piers, piling and wreckage. The plaintiff alleges that the federal government established harbor lines along the river which lines coincide substantially with those established by the plaintiff for a levee; that by statute the plaintiff is given authority to determine the height of the superstructure of all bridges crossing the river within the drainage district and to compel the raising of bridges accordingly. That the defendant owns a bridge across the river within the district, that on or about July 15, 1911, it was notified by the plaintiff to raise its bridge 6.5 feet and to remove the old bridge, superstructure, abutments, piers, piling and wreckage but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri engaged in interstate commerce, its business being that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri to other railways in Kansas and placing such cars for unloading at the various industries along the line of defendant's road in Kansas and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the state of Missouri to and into Wyandotte county and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge. That if such connection is destroyed or its use rendered unavailable the line will be separated and its business as an interstate carrier destroyed and the business of a large number of industries in Kansas greatly injured and in some cases destroyed. That if the bridge is
51 raised as prayed for the defendant's business will be interrupted, its trains can not be transported across the river and its line of road will be cut and all its interstate business effectually destroyed. That the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount of private property abutting upon such streets would be seriously and permanently damaged by the change of grade and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade. That the defendant's tracks on the east side of the bridge are interested by the tracks of three other railroad companies and if the bridge is

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raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that plaintiff has made no arrangements to have the same done; that a compliance with the demand of plaintiff would cost more than $30,000, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law and operate as a direct interference with and a prohibition of interstate commerce as the defendant carries over its lines interstate freight in car load lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge which application is pending and that such change can not be made without consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment
52 on the pleadings and although in the brief there is a long detailed statement of alleged facts we can only consider the case upon the allegations contained in the writ and in the answer and return. There is no allegation in the alternative writ when the federal government established the harbor lines or when and in what manner the defendant constructed the present bridge and no direct allegation as to any old bridge, abutment, piers, piling or wreckage. All we can ascertain from the face of the pleading is that at some time the federal government established harbor lines which coincided substantially with the levee lines established by the plaintiff, that the defendant owns a bridge across the river which it has refused to raise in accordance with the notice and request of the plaintiff. The allegation in the answer that the plaintiff has no power or authority to require the bridge to be raised as demanded is possibly based upon the act of March 3, 1899, which provides (Sec. 9) that it shall not be lawful to construct any bridge over any navigable water of the United States until the consent of Congress shall have been obtained and until the plans shall have been submitted to and approved by the chief engineer and secretary of war. The allegation of the answer that application for such approval has been made and is still pending is attempted to be met by the plaintiff's brief which states that on June 24, 1910, the secretary of war ordered the defendant to do exactly what is now desired by the writ, but this allegation not being contained in the pleadings can not be considered.

Plaintiff also prays for a writ against the Kansas City Terminal Railway Co. to require it to raise its bridge, the allegations being practically identical with those already considered. To this the Terminal Company, after denying all allegations not expressly admitted, avers that it is a Missouri railway corporation engaged in interstate commerce, that its tracks extend from Jackson county, Missouri into and through Wyandotte county, Kansas and other
allegations similar to those already made by the Southern
53 Company; further, that the demand of the plaintiff is unreasonable, illegal and arbitrary and would require either a total

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destruction of defendant's business or necessitate wrongful and illegal acts upon the public streets of Kansas City, Kansas. The answer further alleges that under a contract made on May 28, 1907, with the plaintiff, it was mutually agreed as a compromise and settlement of their differences then in litigation that the defendant would proceed to construct a permanent bridge in accordance with plans shown by a blue print attached to the contract, the plaintiff agreeing to such construction and declaring that when constructed it should constitute a lawful structure, not waiving any right to require the construction of an additional span from the west pier to any harbor line it had established or might thereafter establish. That pursuant to such contract the bridge was constructed at an expense of many thousands of dollars in exact accordance with such blue print and that after such contracts the defendant became owner by purchase of all the tracks heretofore belonging to the Kansas City Belt Railway Company and to the Belt Line Bridge and that no changes have occurred in the river since to warrant the demand sought by the plaintiff. That the plan for such bridge was submitted to and approved by the secretary of war and that the plans for the bridge now demanded have not been submitted to or received the approval of the chief engineer or secretary of war, as provided by the act of Congress March 3, 1899 (30 Stat. at Large, p. 1151), and that any deviation from the former bridge without such submission and approval would be unlawful.

The plaintiff added an amendment to its alternative writ and then asked for judgment on the pleadings. The amendment is that since the construction of the bridge and by virtue of a resolution of Congress February 16, 1909, the secretary of war, through the United States engineering department fixed harbor lines and decreed that the defendant's bridge should be raised. That since the erection of the present bridge the plaintiff ascertained and determined after the flood of 1908 the necessity of raising the bridge as de-
54 manded and that upon order and request so to raise the same the defendant refused.

From the plaintiff's allegations concerning the bridge demanded we deduce that the war department and the plaintiff have ordered the defendant to raise its bridge to the height prayed for and that it has submitted plans to the war department for approval and that such approval has not been obtained or such application passed upon, but the allegation as to the decree of the secretary of war that the bridge be raised stands denied. To cover this gap the plaintiff produces certain blue prints or maps bearing the name of the acting secretary of war and purporting to have been prepared pursuant to a resolution of Congress of February 16, 1909, which resolution authorized the secretary of war to

"fix and establish pierhead and bulkhead lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as shall be prescribed from time to time by the Secretary of War."

These maps also state on their faces that they are

"To accompany report of this date (May 20, 1910) on public hearing January 25-27, 1910 authorized by the Chief of Engineers, U. S. Army." We find in the annual report of the Chief of Engineers for 1910 (p. 1833) a report that a hearing was had in Kansas City, Missouri January 25 with an adjourned hearing to January 27, 1910, and a report submitted May 20, 1910, with map and description of the harbor lines which lines were finally approved by the War Department June 24, 1910. In none of these maps or documents do we find any order to raise the bridge, hence this allegation remains denied and unproved.

As to the contract it seems that by its terms an agreement was made in 1907 that the present bridge should be deemed lawful and sufficient, subject to the requirement of an additional span on the west bank of the river. The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as de-
55 manded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods it must be presumed that its officers are acting in good faith and with sufficient cause and reason and that prima facie, at least, their conclusion as to present requirements is correct. One of the powers of the board repeatedly expressed in the act (Sec. 3006 & Sec. 3009, Gen. Stat. 1909) is to do such things as shall be "conducive to the public health, convenience or welfare," and it is known that the statute was enacted by reason of the flood disasters in 1903 and 1904 with a view to avert their repetition if possible. Among the powers vested in the board are (Sec. 3006):

"To prescribe, regulate and fix the height of the superstructures above the water, * * * to fix, regulate and change the grade or elevation of all public highways, railroads and street railroads at points where any levee may cross or intersect the same, * * * To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course. * * * To do all other acts that may be necessary to carry out and execute the general powers hereinbefore or hereinafter granted, although not hereinbefore specially enumerated."

Being created for the purpose indicated it can not be held that one set of officers can bind themselves or their successors by an agreement like the one in question, for if such could be the case requirements for future conditions would be rendered futile, and conditions agreed upon by one board would have to remain in spite of the desires and conditions possessed and found by a subsequent board. Any person or corporation contracting with the board must be held to do so subject to such subsequent changes in the matters
56 contracted about as subsequent exigencies may require. In its work of clearing the channel of the river and fixing the

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height of superstructures the board is clearly exercising police power, and it is settled that in such cases a contract by which police power is attempted to be abrogated is ultra vires and void. (State v. St. Paul M. & M. Ry. Co., 108 N. W. 261.)

"The right to exercise the police power is a continuing one that cannot be limited or contracted away by the State or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based." (Northern Pacific Railway v. Duluth, 208 U. S. 583.)

In that case it was said in the opinion, p. 596:

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts." On the same page is found a quotation from the decision in New York & New England Railroad Company v. Bristol, 151 U. S. 556:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

It is argued that because the fourth subdivision of this section authorizes the board "to condemn and cause obstructions in such water-courses to be removed" it cannot obtain the relief now
57 prayed for without condemnation and compensation. But the evident meaning of "condemn" as here used is to declare or pronounce a thing to be wrongful, and not to proceed as under the rule of eminent domain to have it appraised.

"Condemn: To pronounce to be wrong; to disapprove of; to censure." (Webster's New Int. Dic. 1911.)

The succeeding clause expressly empowers the board to acquire by "gift, purchase or condemnation" such lands as may be necessary, and it would indeed be an anomoly to speak of condemning an obstruction for the purpose of acquiring title to it.

In answer to the claim of the defendant that it is unlawful for it to change its bridge without approval by the secretary of war under the act of March 3, 1909, plaintiff cites Cummings v. Chicago, 188 U. S. 410 which held that the act of 1899 did not manifest any purpose on the part of Congress to assert power to authorize private persons to erect structures within a navigable water of the United States wholly within the limits of the state, without regard to the wishes upon the concurrent or joint assent of the state and national government. The close of the opinion is as follows:

"The secretary of war acting under the authority conferred by Congress may assent to the erection by private parties of such a structure. Without such assent the structure can not be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

There is nothing in this decision indicating that a bridge across such waters can be lawfully erected or reconstructed until the plans therefor are approved as required by the act of 1899. It is familiar doctrine that when Congress has legislated upon a subject within its power such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded without obtaining the approval of the plans therefor as required by Congress would be to disregard rather than to obey such legislation.

58 There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and State v. Missouri Pacific Railway Company, 33 Kan. 176 and Burlington etc. Railroad Company v. People, 77 Pac. 1026 are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper for the reason that the viaducts sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which cooperation could not be compelled. Here the two defendants only are proceeded against, each separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities,

59 is no sufficient reason for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved

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against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in Balch v. Glenn, 85 Kan. 735 (p. 740):

"Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state."

"Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public." (p. 743). But in this case the parties are corporations formed for a quasi public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

"All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

"The expenses that will be incurred by the railroad company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the company." (Chicago Burlington etc. Railroad v. Chicago, 166 U. S. 226.)

"Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

"It is the duty of the railway company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners, under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws." (C. B. & Q. Railway v. Drainage Comm'rs, 200 U. S. 561).

In the case just cited the court quoted with approval an expression of the supreme court of Illinois that the implied authority of the

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company to build its present bridge was coupled with the common law duty

"to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use." (p. 587).

In Northern Pacific Railway v. Duluth, 208 U. S. 583 it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such
61 repairs could be required by mandamus. The court said (p. 595):

"We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the State to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement."

"But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the State or the municipality to abrogate this power so necessary to the public safety." (p. 598).

The Eighth Circuit Court of Appeals in Chicago B. & Q. R. Co. v. Board of Sup'rs, 182 F. 291, held that

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of unreasonable hostility to the orders of this court or to the welfare of the people composing the drainage district, and it can not be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs
62 and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation

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or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas River all obstructions of every kind where their lines cross such stream, the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 349.26 — above the St. Louis directrix.

All the Justices concurring.

A true copy. Attest:—

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE
Clerk Supreme Court.

63 And also on the 28th day of May, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Petition for a Rehearing, which is in the words and figures, as follows, to-wit:

64 Filed May 28, '12. D. C. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Samuel W. Moore, O. L. Miller, Cyrus Crane, S. W. Sawyer, Attorneys for Defendant.

65 In the Supreme Court of Kansas.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
vs.
KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

Motion for Rehearing on the Part of the Defendant.

Now on this day comes the defendant, Kansas City Terminal Railway Company, and moves the court to grant this defendant a rehear-

ing herein, for all the reasons specifically set out in the answer and return of the defendant, and in the brief filed on behalf of the defendant.

We respectfully urge the court to re-examine the law applicable to the case, and especially the authorities contained in our brief, bearing in mind the fact that there has been no hearing of testimony as to the facts involved in the case, and that all of the allegations of fact contained in the alternative writ are denied by the defendant's answer and return. Consequently, the court must take all of the allegations made in the alternative writ to be untrue and all of the statements made in the defendant's answer and return to be true.

So considered, it is difficult for us to comprehend the theory upon which the court could issue a peremptory writ of mandamus.

66 As we have undertaken to advise the Court in our answer and return, and also in our brief, the practical effect of an order such as issued in this case (unless it is made conditional upon prior action being taken by Kansas City, Kansas, and other railroad companies) is to destroy the use of the defendant's line, and prohibit it from carrying on the inter-state commerce for which it was created, and which it is expressly authorized by Act of Congress to do.

The Act of June 15th, 1866, R. S. 5258, 14 Stat. L. 66, provides:

Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.

The practical effect of the court's decision is to nullify this Act of Congress, and is, we submit, directly contrary to its express provisions.

We earnestly urge that the court, if it cannot see its way clear to refuse the writ entirely (which we think it should do), modify the decision by providing that the writ shall become permanent only after the drainage board has secured from Kansas City, Kansas, and the other railroad companies involved, the necessary permission to disturb their streets and railroad tracks, respectively.

Under the charter of Kansas City, Kansas, it is unlawful for anyone to disturb the streets without the permission of the city, and without certain steps being first taken to determine the dam-

67 ages to property, as provided in Chapter 17, Sections 1020, 1021, 1022, and 1023, General Statutes of Kansas, 1909, pp. 235, 236; and section 1290, p. 305.

The effect of the court's decision is to order the defendant to do an unlawful act, on the chance that something may occur in the future, to make it lawful.

Is it not more logical that the court should order the defendant to do the act desired when it shall become lawful, and require the party desiring the defendant to do the act, to take the plain, obvious steps to make that act lawful?

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We again urge the court to study carefully the case of State v. Mo. Pacific Railway Company, 33 Kansas, 176, because it is conclusive of this case. The important reason why the writ was refused in that case, was because the ordinance sought to be enforced ignored and contravened the express provisions of the Kansas statutes, in regard to street improvements. It failed to provide the steps required by the statutes before such street improvements could be erected. That is exactly the situation in this case, in view of the provisions of the charter of Kansas City, Kansas, above referred to, and we most earnestly submit that the court cannot make this order permanent (unless it makes it conditional upon the necessary steps being first taken to change the grade of the streets of Kansas City, Kansas, and to determine the damage to abutting property owners) without overruling the case of State v. Mo. Pacific Railway Company, supra.

The fairness and equity of making this modification in the order is so obvious that we cannot believe that the court will refuse to make it. There is no question about its power to make the modification, as it is well settled that the issuance of the writ is largely discretionary with the court, and will not be issued even where the
68 plaintiff appears to have a legal right, if its issuance will work unnecessary hardship or injustice.

State ex rel. v. Marston, 6 Kansas, 524;
Evans v. Thomas, 32 Kansas, 469;

in which the court says:

Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to be enforced, and then only when they have no other plain and adequate remedy in the ordinary course of law; and only then when justice will be likely to be defeated or frustrated unless a writ of mandamus be allowed. Also, courts of justice may often exercise a considerable degree of discretion in allowing or refusing writs of mandamus. (State v. Marston, 6 Kas., 524, 537, and cases there cited; A. T. & S. F. Rld. Co. v. Jefferson Co., 12 Id., 136; Golden v. Elliott, 13 Id., 92; The State v. Breese, 15 Id., 125; The State v. Comm'rs of Anderson Co., 28 Id., 70.) Courts of justice may always refuse such writs where their issuance would tend to thwart the administration of justice, instead of contributing to its promotion.

Potwin Place v. Railroad, 51 Kans., 609;
Merrill on Mandamus, Sec. 64, 67;
Spelling Injunctions and Ex. Remedies, Sec. 1371;
High Extraordinary Legal Remedies (3 Ed.), Sec. 9;
In re Key, 189 U. S., 84;
Railroad v. Hall, 91 U. S., 343, 356;
People v. Olson, 74 N. E., 785 (Ill.);
State v. Cottengin, 172 Mo., 129, 134;
State v. Bridge Co., 206 Mo., 74.

SAMUEL W. MOORE,
O. L. MILLER,
CYRUS CRANE,
S. W. SAWYER,
Attorneys for Defendant.

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69 And afterward and on the 14th day of June, 1912, the same being one of the regular Judicial Days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the city of Topeka, the following proceedings among others was had, and made of record, in words and figures as follows, to-wit:

70 In the Supreme Court of the State of Kansas, Friday, June 14, 1912.

No. 18064.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY SOUTHERN R'L'Y CO., Defendant.

18065.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Plaintiff,
v.
THE KANSAS CITY TERMINAL R'L'Y CO., Defendant.

Journal Entry Denying Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered that said petition for a rehearing be denied.

71 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition for a writ of error, in the words and figures as follows, to-wit:

72 Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Kansas, ss·

KANSAS CITY TERMINAL RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Kansas:

The petition of the Kansas City Terminal Railway Company respectfully shows: That on the 11th day of May, A. D. 1912, the Su-

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preme Court of the State of Kansas made and entered a final order and judgment herein against your petitioner, the Kansas City Terminal Railway Company, in a cause wherein the Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff and the Kansas City Terminal Railway Company was defendant, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner in that it deprived your petitioner of rights, titles, privileges and immunities guaranteed it by the Constitution of the United States, because it upholds the validity of a statute of the State of Kansas (Article 3, Chapter 34, General Statutes of Kansas, 1909, p. 661), and authority exercised thereunder by the Kaw Valley Drainage District of Wyandotte County, Kansas, which is repugnant to Section 1 of the Fourteenth Amendment, Section 8, Article 1, and Section 10, Article 1, of the Constitution of the United States, and to the Act of Congress of the United States of March 3, 1899, (Chapter 425, Section 9; 30 Statutes at Large of U. S., p. 1151), and to the Act of Con-
73 gress of the United States of June 15th, 1866 (R. S. Sec. 5258, 14 Stat. L. 66), all of which will more in detail appear from the assignments of error which are filed with this petition.

That the said Supreme Court of the State of Kansas is the highest court of the said state of Kansas in which a decision in this suit and in this matter could be had.

That a reference to the record had in the trial and proceedings in said cause will show that your petitioner has properly preserved and raised those constitutional and statutory rights upon which it relies.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for citation and supersedeas.

Dated this 18th day of June, A. D. 1912.

KANSAS CITY TERMINAL RAILWAY COMPANY,
By S. W. MOORE,
O. L. MILLER,
SAMUEL W. SAWYER,
Its Attorneys.

Let the Writ of Error issue as prayed June —, 1912.

———— ————,
Chief Justice of the Supreme Court of the State of Kansas.

74 [Endorsed:] 18065. K. C. Terminal Railway Co. vs. The Kaw Valley Drainage District of Wyandotte Co., Kansas. Petition for Writ of Error Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

75 And also on the 18th day of June, 1912, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the assignments of errors, which are in the words and figures as follows, to-wit:

76 Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 18065.

KANSAS CITY TERMINAL RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignments of Error.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas in the above entitled matter there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the state of Kansas, by and through the provisions of the said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privilges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law; (3) to deprive and deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the state of Kansas the equal protection of the laws.

77 2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the law.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in violation of Section 8, Article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce among the several states.

7. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is not in violation of Section 10, Article 1, of the Constitution of the United States, which prohibits the passage by a
78 state of any law impairing the obligation of contracts.

8. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, sec. 9, 30 Statutes at Large, p. 1151), yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said Act of Congress

9. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not in violation of Act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large, 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

10. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge without any hearing or any opportunity on the part of the Plaintiff in Error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

11. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff having been given any opportunity to present a defense or to be heard upon the facts, is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property without due process of law.

79 12. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court; and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff the rights, privileges, and immunities guaranteed to it by section 1 of

the Fourteenth Amendment to the Constitution of the United States.

13. The decision of the court in this case is repugnant to the act of Congress of the United States of March 3, 1899, (Chap. 425, sec. 9; 30 Statutes at Large 1151), in that no plans for the changing or raising of the plaintiff in error's bridge have been submitted to the Chief of Engineers or the Secretary of War by the defendant in error or any one else.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of March 3, 1899, (Chap. 425, sec. 9; 30 Statutes at Large 1151), and denies to plaintiff in error the rights, privileges, and immunities, secured to it by said act in that no plans for the changing of the plaintiff in error's bridge have been submitted to Chief of Engineers or the Secretary of War by the defendant in error or any one else, and the court erred and denied to the plaintiff in error the rights, privileges, and immunities guaranteed, to it by said act, in refusing to so hold.

15. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866, (Revised Statutes, sec. 5258, 14 Statutes at Large, 66), and denies to plaintiff in error
80 the rights, privileges and immunities secured to it by said act, in that the plaintiff in error is deprived of its right, to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

16. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the act of Congress of the United States of June 15, 1866, (Revised Statutes sec. 5258, 14 Statutes at Large 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination, and the court erred and denied to the plaintiff in error the rights, privileges and immunities, guaranteed to it by said act in refusing to so hold.

17. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

18. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not in violation of section 10 of Article 1 of the Constitution of the United States in that it impairs the obligation of a contract between the plaintiff in error and the defendant in error.

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81 19. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not repugnant to the act of Congress of the United States of March 3, 1899, (chap. 425, sec. 9; 30 Statutes at Large, 1151), in that no plans for the raising or changing of the plaintiff in error's bridge have been submitted to or received the approval of the Chief of Engineers or the Secretary of War.

20. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not repugnant to the act of Congress of the United States of June 15 1866, (Revised Statutes 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

21. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

22. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

23. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws

82 in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also, on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the

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defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error; but facts which were entirely outside of the record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing and without compliance with the forms of law or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any
83 hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas and contrary to the rights accorded other litigants.

Wherefore, plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

S. W. MOORE,
O. L. MILLER,
SAMUEL W. SAWYER,
Attorneys for Plaintiff in Error.

84 [Endorsed:] 18,065. K. C. Terminal Co. v. The Kaw Valley Drainage District of Wyandotte Co., Kansas. Assignments of Error. Filed Jun- 18, 1912. D. A. Valentine, Clerk Supreme Court.

85 And afterward and on the 25th day of June 1912, the same being one of the regular judicial days of the January Term, 1912, of the Supreme Court of the State of Kansas, in session at the Supreme Court room in the City of Topeka, the following proceedings among others *was* had, and made of record, as follows, to-wit:

86 In the Supreme Court of the State of Kansas.

No. 1865.

THE KAW VALLEY DRAINAGE DISTRICT, WYANDOTTE COUNTY, KANSAS, Defendant,
vs.
THE KANSAS CITY TERMINAL RAILWAY COMPANY, Defendant.

And now on this 25th day of June, 1912, comes O. L. Miller and S. W. Sawyer, attorneys for the above named defendant and presents to the Honorable W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, their petition for the allowance of a

writ of error herein for the purpose of perfecting an appeal to the United States Supreme Court; and also comes L. W. Keplinger, attorney for the plaintiff and opposes the allowance of said petition. And thereupon, and after due consideration it is ordered, that the application for a writ of error be denied, for the reason that no federal question is involved. And thereupon the attorneys for the defendant except to the ruling denying said application, and said exception is allowed.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice, Supreme Court of the State of Kansas.

87 In the Supreme Court of the State of Kansas.

STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct and complete transcript of the pleadings and papers filed, and of all proceedings had, in said court in above entitled cause, as the same remain on file and of record in my office.

Witness my hand, and the seal of the Supreme Court of the State of Kansas affixed hereto, at my office in the City of Topeka this 27th day of June 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

88 Here follows the Original Petition for a Writ of Error, the Assignments of Errors and Prayer for Reversal, the Writ of Error, the Citation and proof of service thereof, and a copy of the Bond.

89 *Petition for Writ of Error.*

To the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States:

The petition of Kansas City Terminal Railway Company, a corporation of the State of Missouri, respectfully shows:

That heretofore, on the 9th day of February, 1912, there was instituted in the Supreme Court of the State of Kansas, by The Kaw Valley Drainage District of Wyandotte County, Kansas, a public corporation, organized under the laws of the State of Kansas, an original proceeding in mandamus, by which said Kaw Valley Drainage District of Wyandotte County, Kansas, prayed a writ to compel your petitioner to raise a certain bridge across the Kansas or Kaw River, which it was alleged that your petitioner owns, four and ninety-six hundredths (4.96) feet above its present height.

The petition of the plaintiff and the alternative writ alleged that the plaintiff, under the authority of the laws of the State of Kansas, did order and direct that said bridge be so raised.

Thereafter, your petitioner filed its return to the alternative writ, which was issued by the Supreme Court of the State of Kansas, denying all of the allegations in the plaintiff's petition, and in the alternative writ, except the fact that the plaintiff was a public corporation; that the defendant was a railway corporation; that the Kansas River flows through the Kaw Valley Drainage District, and that your petitioner owns a bridge across said River.

In said return your petitioner also showed that the order and direction of the Plaintiff, if enforced, was repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States; to Section 8 of Article I of the Constitution of the United States; and to Section 10 of Article I of the Constitution of the United States; and to the Act of Congress of the United States, of June 15th, 1886 (R. S. 5258; 14 Stat. L. 66); to the Act of Congress of the United States of March 3, 1899 (chapter 425, Section 9; 30 Stat. L.
90 1151); and that it would deprive your petitioner of rights, privileges and immunities under such provisions of the Constitution of the United States and under the Statutes and laws of the United States, and particularly under said Statutes of the United States above referred to; all of which will more particularly appear in the record and proceedings in said Supreme Court of the State of Kansas, and in the Assignment of Errors filed herewith.

That thereafter, on or about the 11th day of May, A. D. 1912, the Supreme Court of the State of Kansas made and entered a final judgment and order in said cause against your petitioner, requiring, ordering and directing that your petitioner remove its bridge from said River, together with all abutments and piers belonging thereto. In effect the Court held that it could not, without violating the said Act of Congress of March 3rd, 1899, order the plaintiff in error's bridge to be reconstructed and raised as prayed by the defendant in error, but attempted to avoid the effect of said act of Congress by ordering and directing that the plaintiff in error do what was not prayed by the defendant in error, nor set out in the alternative writ in said cause—that is, to remove and entirely destroy the plaintiff in error's bridge, with all its piers and abutments. The effect of this decision is not only directly contrary to said Act of Congress of March 3rd, 1899, but also would result in the utter destruction of the plaintiff in error's line of railway, and would deprive it of property without due process of law, and disable it from carrying on its business of interstate transportation, as it is authorized to do by the Act of Congress of June 15th, 1886. That the effect of said decision is an attempt on the part of the State of Kansas to declare a structure made lawful by the laws of the United States to be unlawful, without any concurrent action by Congress or the properly constituted authorities of the United States. That the said decision also sustains the defendant in error in the exercise of a delegated legislative power, which directly impairs the obligation of the contract of May 28, 1907, between the defendant in error and the Kansas City Belt Rail-

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way Company, referred to and set out in the record in said cause.

91 That in said final order and judgment, and the proceedings had thereunto in said cause, certain errors were committed, to the prejudice of your petitioner, in that your petitioner was deprived of certain rights, titles, privileges and immunities guaranteed to it under the Constitution and laws of the United States, and in that an authority exercised under the State of Kansas, which was and is repugnant to the Constitution and laws of the United States, was enforced and held valid by said Supreme Court of the State of Kansas, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

That the said Supreme Court of the State of Kansas is the highest Court in said State of Kansas in which a decision in this suit and this matter could be had.

That a reference to the record had in the trial and proceedings of said cause, will show that your petitioner has properly preserved and raised those federal questions and rights upon which it relies.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Kansas, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner further prays for a citation and supersedeas.

KANSAS CITY TERMINAL RAILWAY COMPANY,
By ALDIS B. BROWNE,
SAMUEL W. MOORE,
O. L. MILLER,
SAMUEL W. SAWYER,
Its Attorneys and Counsel.

Let the writ of error issue as prayed this July 5th, 1912.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

92 The Supreme Court of the United States.

KANSAS CITY TERMINAL RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas in the above entitled matter there is manifest error in this, towit:

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1. The court erred in holding that the provisions of Article 3, Chapter 34, of the General Statutes of the State of Kansas for the year 1909, and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in conflict with and in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, for that the State of Kansas, by and through the provisions of the said act and the authority exercised thereunder assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States of rights, privileges and immunities secured to other citizens of the United States and of the said state; (2) to deprive the plaintiff in error and other citizens of the United States of liberty and property without
93 due process of law; (3) to deprive any deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Kansas the equal protection of the laws.

2. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of rights, privileges and immunities secured to citizens of the United States by the Constitution of the United States and the laws of the United States.

3. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not deprived of liberty and property without due process of law.

4. The court erred in holding that by the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, the plaintiff in error is not denied the equal protection of the laws.

5. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is within the police powers of the Legislature of the State of Kansas.

6. The court erred in holding that the provisions of the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in violation of Section 8, Article 1, of the Constitution of the United States which confers upon the Congress of the United States the exclusive power to regulate commerce among the several states.

7. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised thereunder, is not in violation of Section 10, Article 1, of the Con-
94 stitution of the United States, which prohibits the passage by a state of any law impairing the obligation of contracts.

8. The court erred in that, while it appeared that the authority sought to be exercised under the said act in this case was repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large, p. 1151,) yet the Court in its decision orders indirectly that which it admits it could not order directly except in violation of the said Act of Congress.

9. The court erred in holding that the said act and the authority exercised thereunder and thereby authorized to be exercised, is not

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in violation of Act of Congress of the United States of June 15, 1866 (R. S. 5258, 14 Statutes at Large, 66), in that it deprives the plaintiff in error of the use of its line of railway and denies to it the right and privilege of carrying on interstate commerce as it is expressly authorized by said act so to do.

10. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge, without any hearing or any opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

11. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff having been given any opportunity to present a defense or to be heard upon the facts, is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property without due process of law.

95 12. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court; and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the Court, the Supreme Court of Kansas denied the plaintiff the rights, privileges and immunities guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

13. The decision of the Court in this case is repugnant to the Act of Congress of the United States of March 3, 1899, (Chap. 425, sec. 9, 30 Statutes at Large, 1151), in that no plans for the changing or raising of the plaintiff in error's bridge have been submitted to the Chief of Engineers or the Secretary of War by the defendant in error or any one else.

14. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9; 30 Statutes at Large, 1151), and denies to plaintiff in error the rights, privileges and immunities, secured to it by said act in that no plans for the changing of the plaintiff in error's bridge have been submitted to the Chief of Engineers or the Secretary of War by the defendant in error or any one else, and the court erred and denied to the plaintiff in error the rights, privileges and immunities guaranteed to it by said act, in refusing to so hold.

15. The decision of the court is repugnant to the Act of Congress of the United States of June 15, 1866, (Revised Statutes, Sec. 5258, 14 Statutes at Large, 66) and denies to plaintiff in error

96 the rights, privileges and immunities secured to it by said act, in that the plaintiff in error is deprived of its right, to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one

state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

16. The alleged action of the defendant in error in regard to plaintiff in error's bridge is repugnant to the Act of Congress of the United States of June 15, 1866, (Revised Statutes, sec. 5258, 14 Statutes at Large, 66), in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination, and the court erred and denied to the plaintiff in error the rights, privileges and immunities, guaranteed to it by said act in refusing to so hold.

17. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the law.

18. The court erred in holding that the alleged action of the defendant in error, in regard to the plaintiff in error's bridge, is not in violation of section 10 of Article 1 of the Constitution of the United States, in that it impairs the obligation of a contract between the plaintiff in error and the defendant in error.

97 19. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge is not repugnant to the act of Congress of the United States of March 3, 1899, (Chap. 425, Sec. 9, 30 Statutes at Large, 1151,) in that no plans for the raising or changing of the plaintiff in error's bridge have been submitted to or received the approval of the Chief of Engineers or the Secretary of War.

20. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not repugnant to the act of Congress of the United States of June 15, 1866 (Revised Statutes 5258, 14 Statutes at Large, 66) in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said act.

21. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge does not deprive the plaintiff in error of its property without due process of law and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

22. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

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23. The decision of the Court denies to the plaintiff in error, the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in section 1 of the Fourteenth Amendment to the Constitution of the United States,
98 in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws in these respects, to-wit:

(*a*) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form, and as required by law. The decision of the Supreme Court of the State of Kansas, proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a Master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(*b*) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief also, on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a Master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(*c*) The Supreme Court of Kansas granted final relief to the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true, facts not even alleged by the defendant in error; but facts which were entirely outside of the record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(*d*) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing and without compliance with the forms of law or the procedure required by the Constitution and Statutes of the State of Kansas in every kind and character of litigation.

(*e*) The decision of the Supreme Court of Kansas while ostensibly upon the pleadings, in fact determined the issues
99 upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the State of Kansas and contrary to the rights accorded other lit-gants.

Wherefore, plaintiff in error prays that the final decision of the Supreme Court of Kansas in this cause be reversed by the Supreme Court of the United States.

KANSAS CITY TERMINAL RAILWAY COMPANY,
By SAMUEL W. MOORE,
O. L. MILLER,
ALDIS B. BROWNE,
SAMUEL W. SAWYER,
Attorneys for Plaintiff in Error.

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100 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Kaw Valley Drainage District of Wyandotte County Kansas, plaintiff, and The Kansas City Terminal Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the
101 construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant, The Kansas City Terminal Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

July 5, 1912.

Allowed by and to operate as a supersedeas.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

COPY BOUND

102 UNITED STATES OF AMERICA, *ss:*

To The Kaw Valley Drainage District of Wyandotte County, Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Kansas, wherein The Kansas City Terminal Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, this 5th day of July, in the year of our Lord one thousand nine hundred and twelve.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

103 On this 9th day of July, in the year of our Lord one thousand nine hundred and twelve, personally appeared Clarence R. Hall before me, the subscriber, and makes oath that he delivered a true copy of the within citation to C. W. Trickett, one of the Attorneys for defendant in error.

CLARENCE R. HALL.

Sworn to and subscribed the 9th day of July, A. D. 1912.

[Seal Charles A. Peabody, Notary Public, Jackson Co., Missouri.]

CHARLES A. PEABODY,
Notary Public in and for Jackson County, Missouri.

My Commission Expires June 4, 1914.

104 In the Supreme Court of the United States.

KANSAS CITY TERMINAL RAILWAY COMPANY, Plaintiff in Error,
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, Defendant in Error.

Bond.

Know all men by these presents: That we, Kansas City Terminal Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, as principal, and United States Fidelity and Guaranty Company of the State of Maryland, a corporation organized and existing under and by virtue of the laws of Maryland, as surety, are held and firmly bound unto The Kaw Valley Drainage District of Wyandotte County, Kansas, in the

sum of one hundred thousand dollars ($100,000) to be paid to the said obligee, to the payment of which, well and truly to be made, the said principal and the said surety bind themselves, their and each of their successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of July, A. D. 1912.

Whereas, the above-named plaintiff in error seeks to prosecute its writ of error in the Supreme Court of the United States, to reverse the judgment and decree rendered against it by the Supreme Court of the State of Kansas, in a proceeding wherein The Kaw Valley Drainage District of Wyandotte County, Kansas, was plaintiff and Kansas City Terminal Railway Company was defendant;

105 Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its writ of error to effect, and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

KANSAS CITY TERMINAL RAILWAY COMPANY,
By H. H. ADAMS, *Its President.*

[SEAL.]
Attest: C. C. RIPLEY, *Secretary.*

UNITED STATES FIDELITY & GUARANTY COMPANY,
By MERRITT W. LUCAS,
Attorney-in-Fact.

July 5, 1912.

Bond approved and to operate as supersedeas.
WILLIS VAN DEVANTER, [SEAL.]
Justice of the Supreme Court of the United States.

O. K. F. H.

106 *Power of Attorney.*

13637.

Know all men by these presents: That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint J. W. Bebout, Merritt W. Lucas and (Miss) J. L. Cross, of Kansas City, state of Missouri, its true and lawful attorneys in and for the States of Kansas, Oklahoma and Missouri, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of

COPY BOUND CLO

Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever any one of the said J. W. Bebout, and the said Merritt W. Lucas, and the said J. L. Cross, may lawfully do in the premises by virtue of these presents.

In witness whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 2nd day of October, A. D. 1911.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

(Sig.) By W. W. SYMINGTON,
Vice-President.

[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.

STATE OF MARYLAND,
Baltimore City, ss:

On this 2nd day of October, A. D. 1911, before me personally came W. W. Symington, Vice President of the United States Fidelity and Guaranty Company, and Wm. T. Morgan, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland, that they, the said W. W. Symington, and Wm. T. Morgan were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively of said Company.

My commission expires the first Monday in May, A. D. 1912.

[SEAL.] (Sig.) A. D. PATRICK,
Notary Public.

STATE OF MARYLAND,
Baltimore City, sct:

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In testimony whereof I hereto set my hand and affix the seal of

SE IN CENTER

the Superior Court of Baltimore City, the same being a Court of Record, this 2nd day of October, A. D. 1911.

[SEAL.] (Sig.) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

107 *Copy of Resolution.*

That whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, Be It Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver and and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

In testimony whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 2nd day of October, A. D. 1911.

[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.

COPY BOUND CLOS

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to J. W. Bedout, Merritt W. Lucas and (Miss) J. L. Cross of Kansas City, Missouri, authorizing and empowering them to sign bonds as therein set forth.

Given under my hand and seal of said Company, at Baltimore, Maryland, this 9th day of October, A. D. 1911.

[SEAL.] WM. T. MORGAN,
Assistant Secretary.

(On Back:) Certified Copy. No. 13637. General Power of Attorney From United States Fidelity and Guaranty Company to Lucas & Bebout, Kansas City, Mo. 10-2-11. Filed ——.

108 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine Clerk of said court, do hereby certify that there was lodged with me as such clerk on July 10, 1912, in the matter of The Kansas City Terminal Railway Company, versus The Kaw Valley Drainage District of Wyandotte County, Kansas,

1 The original Bond of which a copy is herein set forth.

2 Two copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 18th day of July, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

109 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 18th day of July 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

Endorsed on cover: File No. 23,310. Kansas Supreme Court. Term No. 314. The Kansas City Terminal Railway Company, plaintiff in error, vs. The Kaw Valley Drainage District of Wyandotte County, Kansas. Filed July 27th, 1912. File No. 23,310.

Office Supreme Court, U. S.
FILED.
OCT 12 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY TERMINAL RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. 314

MOTION TO DISMISS, AFFIRM OR ADVANCE.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

The Press Print, Kansas City, Kansas

IN THE

SUPREME COURT

OF THE

UNITED STATES

THE KANSAS CITY TERMINAL RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY,
Defendant in Error.

No. **735**

MOTION TO DISMISS, AFFIRM OR ADVANCE.

Defendant in error, The Kaw Valley Drainage District of Wyandotte County, moves the court:

First. To dismiss said cause for the reason that no Federal question is involved, all such questions having been repeatedly determined by this court adverse to

the claims made by plaintiff in error; or, if said motion be denied,

Second. To affirm the judgment of the trial court, for the reason that the writ of error was procured for delay, only, and the questions upon which the decision of the court depend are so frivolous as not to require further argument; or, in the event that both said motions be denied,

Third. To transfer said cause to the summary docket as provided in paragraph five, rule six.

L. W. KEPLINGER,
C. W. TRICKETT,
Attorneys and Solicitors for Defendant in Error.

ARGUMENT IN SUPPORT OF MOTION.

This is an action for mandamus, brought in the Supreme Court of Kansas, by the defendant in error.

The alternative writ alleges that the defendant in error is a drainage district, organized under Chapter 215, Session Laws of 1905, of Kansas; that the Federal government established harbor lines along the river, which lines coincide substantially with those established by the plaintiff for a levee; that by statute the defendant in error is given authority to determine the height of the superstructure of all bridges crossing the river within the district, and to compel the raising of bridges accordingly; that the defendant owns a bridge across the river within said district; that on or about July 15, 1911, it was notified to raise its bridge, superstructure, abutments, piers, piling and wreckage, but that it has failed, neglected and refused so to do.

The defendant answers that it is a railway corporation, and citizen of Missouri, engaged in interstate commerce, its business being that of a switching company, moving cars received from other railroads, handling shipments of goods received from states other than Kansas, such railroads having no tracks connected with the industries to which such goods are assigned, and transferring cars loaded with such shipments from Kansas City, Missouri, to other railways in Kansas and placing such cars for unloading at the various industries along the line of the defendant's road in Kansas, and taking such cars there loaded and transporting them to Kansas City, Missouri; that its tracks extend from the State of Missouri to and into Wyandotte County, and are laid across the bridge in question, the defendant having no other connection than its tracks across such bridge; that if such connection is destroyed or its use rendered unavailable, the line will be separated and its business as an interstate carrier destroyed, and the business of a large number of industries in Kansas greatly injured and in some cases destroyed; that if the bridge is raised as prayed for the defendant's business will be interrupted, its trains cannot be transported across the river, and its line of road will be cut and all its interstate business effectually destroyed; that the present height of its tracks upon the bridge is such that any additional elevation will preclude the use of the bridge for trains except by the construction of another approach at either end several feet above the surface of the defendant's tracks; that such approaches extend across various public streets in Kansas City, Kansas, not under the control of the defendant; that the defendant has no right, power or authority to raise its tracks upon such streets unless their grade is raised by order of the city; that a large amount

of private property abutting upon such streets would be seriously and permanently damaged by the change of grade, and that the plaintiff has taken no steps to ascertain such damages or compensate the owners therefor; that the city refuses to change the grade; that the defendant's tracks on the east side of the bridge are intersected by the tracks of three other railroad companies, and if the bridge is raised as desired such tracks would be cut in two and rendered useless unless also raised by their owners, which such owners refuse to do, and that the plaintiff has made no arrangements to have the same done; that a compliance with the demand of the plaintiff would cost more than $30,000.00, and the destruction of the bridge for railway purposes would injure the defendant many hundred thousands of dollars; that the enforcement of the plaintiff's demand would deprive the defendant of its property without due process of law and deny it the equal protection of the law, and operate as a direct interference with and a prohibition of interstate commerce, as the defendant carries over its lines interstate freight in carload lots, and that the defendant has made application to the chief of engineers and secretary of war for approval of plans for rebuilding its bridge, which application is pending, and that such change cannot be made without the consent of such officers. Except as specifically admitted, the answer denies all allegations of the alternative writ.

The plaintiff withdrew its reply and moved for judgment on the pleadings.

The defendant in its answer claims that to comply with the order applied for will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation

being made to this defendant or any adequate protection to the business interests threatened; also, that the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, contrary to the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and will operate as a direct interference with the interstate commerce, and a prohibition of interstate commerce, in contravention of the provisions of Section Eight of Article Seven of the Constitution of the United States.

The answer further alleges that the present bridge now sought to be altered and raised, was erected in accordance with the provisions of a prior contract between the parties, and that to compel the changes now asked for, would violate the rights of defendant under Section Twelve, Article One of the Constitution prohibiting the impairment of obligations of contracts.

The answer further alleged that plans for the modification of the bridge as demanded had never been submitted to or approved by the Secretary of War, and that for that reason the modification as demanded would be unlawful.

Upon motion for judgment upon the pleadings, a mandatory order was issued, as prayed for.

While other questions were, or possibly might have been, raised in the court below, the sole question to be considered by this court is whether, by reason of the facts alleged in defendant's answer, the awarding of the writ was in violation of any rights which the defendant had under the Federal Statute or Constitution, as claimed.

That the state has the right to compel the removal of obstructions in the bed of navigable streams which

lie wholly within the state, is no longer an open question.

Northshore Boom Company v. *Necomen Boom Company*, 212 U. S. 412; 29 S. C. R. 355.

Montgomery v. *Portland*, 190 U. S. 89; 23 S. C. R. 735.

Cummings v. *Chicago*, 188 U. S. 410.

That the defendant itself must bear the expense of making changes required by the state, see:

C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226, paragraph 8.

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S. 583.

"The expense of constructing a railway bridge over a highway made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast upon the railway company without denying the due process of law guaranteed by the Federal Constitution which requires that compensation be made where private property is taken for public use."

Cincinnati, etc., Ry. Co. v. *City of Connersville*, 31 S. C. R. 93; 218 S. C. R. 336.

See also, *Chicago, B. & Q. R. R. Co.* v. *Illinois, ex rel Grimwood*, 26 S. C. R. 342, which says:

"The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek, by drainage commissioners acting under the authority of the Illinois Drainage Act, does not amount to a taking of private property for public use which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution."

With respect to the claim that to award the order

would violate the terms of the prior contract pursuant to which the present bridge is claimed to have been constructed, we cite:

Manigault v. *Springs*, 199 S. C. 480; 26 S. C. 130.

Also, *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583.

"It is the settled rule of this court that the interdiction of statutes impairing the obligations of contracts, does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

From all of which it clearly appears that this court has already decided adversely to plaintiff in error as to every claim of Federal right asserted by it.

Wherefore, no Federal question is involved, and this court has no jurisdiction.

McGilvra et al v. *E. W. Ross et al*, 30 S. C. R. 27; 215 U. S. 95.

Mo. Pac. Ry. Co. v. *Castle*, 32 S. C. R. 606.

L. W. KEPLINGER,
C. W. TRICKETT,
For Defendant in Error.

To the Kansas City Terminal Ry. Co., Plaintiff in Error:

You are hereby notified that on October 14, 1912, or as soon thereafter as the same can be heard, the de-

fendant in error will present the above motion to dismiss, advance or affirm.

L. W. KEPLINGER,
C. W. TRICKETT,
Solicitors for Defendant in Error.

SERVICE.

Service of copy of the foregoing motion, argument and notice is hereby acknowledged this 20th day of September, 1912.

O. L. MILLER,
Solicitor for Plaintiff in Error.

17

Supreme Court, U. S.
FILED
MAR 11 1914
JAMES D. MAHER
CLERK

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY TERMINAL RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 314.

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
For Plaintiff in Error.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1913.

THE KANSAS CITY TERMINAL RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

No. 314.

In Error to the Supreme Court of Kansas.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This case is here on writ of error to the Supreme Court of Kansas, the opinion of that court being reported in 87 Kansas 272, and also set out in full in the record here. (Record, p. 22.) A motion to dismiss or affirm for want of jurisdiction was overruled by this Court on October 28th, 1912.

The Kaw Valley Drainage District of Wyandotte County, Kansas, a public corporation created under the statutes of

Kansas (Laws of Kansas 1905, Chapter 215) with power "to prescribe, regulate and fix the height of superstructures above the water, the length of all spans and the location of the piers of all bridges across water courses situated in the district," and to "condemn and cause obstructions in such water courses to be removed," instituted this action by filing in the Supreme Court of Kansas its application for a writ of mandamus against the plaintiff in error, hereinafter called the defendant, upon which an alternative writ of mandamus was issued. (Rec., pp. 3, 13, 14, 15.) After the defendant had filed its answer and return and the Drainage District had filed a reply, the Drainage District withdrew its reply and filed a motion for judgment on the pleadings, upon which the case was submitted to the court. (Rec., pp. 19, 20.) The alternative writ was made peremptory with a modification which will be referred to later. (Rec., p. 21.)

The purpose of the writ was to require the defendant to raise its bridge over the Kaw river 4.96 feet, or to a height of 342.13 feet above the St. Louis directrix. The petition for mandamus, which is also embodied in the alternative writ, alleged in substance that the Kansas river flows through the Drainage District and is a navigable stream; that it overflowed its banks in 1903 and a large part of Kansas City, Kansas, was flooded, and much damage done by reason thereof; that the Drainage District had the statutory powers above mentioned; that the defendant owned a bridge across the Kaw river; that the Drainage District, prior to the bringing of the application, had notified the defendant to raise its bridge to the height specified, and that "the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto." The alternative writ, after reciting the filing of the petition, etc., proceeds:

"Now, therefore, we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Belt Line Bridge over the Kansas river 4.96 feet, or so that the lowest point of superstructure will be 342.73 feet above St. Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed, or that you appear before the Supreme Court of Kansas at the state capitol in Topeka, Kansas, on the 20th day of February, 1912, at ten o'clock a. m. of said day and show cause by answer filed herein why you will not do so," etc. (Rec., pp. 14, 15.)

The defendant's answer admitted that the Drainage District was a public corporation; that the defendant was a railway corporation; that the Kansas river flowed through the Kaw Valley Drainage District, and that the defendant owned a bridge across the Kansas river, and denied all of the other allegations of the petition and alternative writ. (Rec., p. 5.) The answer then set up the following affirmative defenses:

(1) That the defendant was a railway company engaged in interstate commerce which was carried on and over said bridge; that the effect of raising the bridge as prayed would be to destroy the use of the bridge, disrupt the defendant's line and prohibit it from carrying on interstate commerce, *unless* the defendant should construct long approaches to said bridge which would extend upon and over the streets of Kansas City, Kansas, and obstruct them, and which would likewise cut into and destroy the use of tracks of other railway companies intersecting the defendant's tracks, unless they were also raised; that the obstruction of the streets of Kansas City, Kansas, in the manner stated would be unlawful, and that the city of Kansas City, Kansas, which had exclusive control of said streets, had refused to make any changes whatsoever in the grade of said streets to conform to any such proposed approach; that, if the streets were changed to conform to such approaches, private property abutting thereon would be seriously and permanently damaged, and that the Drainage Dis-

trict had taken no steps to ascertain such damages or to compensate the owners therefor; that the railway companies whose tracks intersect the defendant's railway likewise refused to make any change in them, and that the Drainage District had taken no action whatsoever in this proceeding, or elsewhere, to secure the raising of such intersecting tracks either by private agreement or compulsory action, so that the defendant, if it complied with the Drainage District's request, would be obliged to violate the law of the state and in effect to take private property of other persons without compensation and without even a judicial proceeding.

(2) That the demand of the plaintiff, if complied with, would result in enormous expense to this defendant, and that the imposition of this expense was not based upon any necessity, but was unreasonable and arbitrary.

(3) That in 1907 the Drainage District, which was at the time in litigation with The Kansas City Belt Railway Company, the defendant's predecessor, and other railway companies in regard to matters in connection with the Kansas river, entered into a contract with the Belt Company, a copy of which is attached as an exhibit to the answer (Rec., p. 11) by the terms of which the Drainage District approved the plans which the Belt Company had drawn for a bridge across the Kaw river and authorized the Belt Company to construct a bridge across the Kaw river in accordance with said plans, the Belt Company agreeing that, in the event the Drainage District was successful in the litigation in which it was involved, the Belt Company would construct an additional span to the bridge so as to conform to the harbor lines desired by the Drainage District; that no changes in conditions whatsoever had arisen since the execution of the contract which would call for a change in legislative policy, but that the action of the Drainage District was capricious, arbitrary and without reason or necessity, and impaired the obligation of the contract.

(4) That the plans for a bridge across the Kansas river, which was a navigable river wholly within the state of Kansas,

showing the full detail of the construction thereof, including the height of the same, were duly presented to and duly approved by the Chief of Engineers of the United States Army and the Secretary of War before the construction thereof was commenced, and that said bridge was constructed in accordance with the plans so submitted and approved; that no plans for the modification of the bridge as demanded by the Drainage District have been submitted to or received the approval of the Chief of Engineers of the United States Army, or of the Secretary of War, and that any deviation or modification from the plans of said bridge or any change in said bridge after the same had been constructed in accordance with the plans so approved without being submitted to and approved by the Chief of Engineers and the Secretary of War would be unlawful and in violation of the Act of Congress of March 3, 1899. (Ch. 425, Sec. 9, 30 Stat. at Large, p. 1151.)

Each of these affirmative defenses raised federal questions under the Fourteenth Amendment; Section 8, Article I of the Constitution, conferring the power to regulate interstate commerce upon Congress; Section 12, Article I of the Constitution, prohibiting the impairment of the obligation of contracts; the Act of Congress of March 3, 1899, already referred to, and the Act of January 15, 1866 (14 Stat. at Large 66), authorizing railroad companies to engage in interstate commerce.

A single final judgment was entered in this case and in a companion case against the Kansas City Southern Railway Company. In this judgment the court did not make peremptory the requirement in the alternative writ which the defendant was cited to show cause against—the raising of defendant's bridge—but "to forthwith remove from the channel of the Kansas river all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis directrix, and commanding the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis

directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $..... and hereof let execution issue." (Record, p. 21.)

The defendant filed a motion for rehearing which was overruled. The Supreme Court of Kansas declining to issue a writ of error to this Court, the writ was allowed with supersedeas by Mr. Justice Van Devanter.

Each of the questions raised by the defendant's answer is here again raised, and, in addition, we contend that the decision of the Supreme Court of Kansas in itself deprives the defendant of its property without due process of law and of the equal protection of the laws because it proceeded to determine the case on the pleadings without giving the defendant any opportunity to present evidence on disputed questions of fact; because it ordered the defendant to do something entirely different from what was asked of it by the alternative writ, and something which the Drainage District did not even claim it had notified the defendant to do; and because it ordered the destruction and removal of defendant's bridge when it is admitted that the raising of the bridge would be sufficient to accomplish the Drainage Board's purpose.

We shall discuss the questions raised by the defendant's answer on the basis of the allegations of the answer, since, on a motion for judgment on the pleadings, the allegations of the answer must be taken as true.

SPECIFICATION OF ERRORS.

Plaintiff in error specifies the following errors of the Supreme Court of Kansas, contained in its Assignment of Errors, which are asserted and intended to be urged.

1. The court erred in holding that the provisions of the said Act and the authority exercised thereunder and thereby authorized to be exercised thereunder, are not in violation of Section 8, Article I, of the Constitution of the United States, which confers upon the Congress of the United States the exclusive power to regulate commerce among the several states.

(Assignments of Error, No. 6, Record, p. 37.)

2. The court erred in that, while it appeared that the authority sought to be exercised under the said Act in this case was repugnant to the Act of Congress of United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large, p. 1151), yet the court in its decision orders indirectly that which it admits it could not order directly except in violation of the said Act of Congress.

(Assignments of Error, No. 8, page 37.)

3. The court erred in holding that the action alleged to have been taken by the defendant in error in regard to plaintiff in error's bridge without any hearing or any opportunity on the part of the plaintiff in error to be heard, did not deprive the plaintiff in error of its property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(Assignments of Error, No. 10, page 37.)

4. The decision of the court in ordering the plaintiff in error to do certain acts without the plaintiff having been given any opportunity to present a defense or to be heard upon the facts, is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of its property without due process of law.

(Assignments of Error, No. 11, page 37.)

5. The plaintiff in error is deprived of its property without due process of law in that it has never been given a hearing or had an opportunity to present evidence either before the defendant in error or before any court or other tribunal as to the cost or necessity of raising its bridge or doing any of the other acts desired and prayed for by the defendant in error or ordered by the court; and in holding that the plaintiff in error could be required to raise or remove its bridge or perform the other acts ordered by the court, the Supreme Court of Kansas denied the plaintiff the rights, privileges, and immunities guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(Assignments of Error, No. 12, page 37.)

6. The decision of the court in this case is repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large 1151), in that no plans for the changing or raising of the plaintiff in error's bridge have been submitted to the Chief of Engineers or the Secretary of War by the defendant in error or anyone else.

(Assignments of Error, No. 13, page 38.)

7. The decision of the court is repugnant to the act of Congress of the United States of June 15, 1866 (Revised Statutes, Sec. 5258, 14 Statutes at Large 66), and denies to plaintiff in error the rights, privileges and immunities secured to it by said act, in that the plaintiff in error is deprived of its right to carry upon and over its road and bridge all passengers, troops, government supplies, mails, freight and property on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of same to the places of destination.

(Assignments of Error, No. 15, page 38.)

8. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not in violation of Section 1 of the Fourteenth Amendment

to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law, and in that it deprives the plaintiff in error of the equal protection of the laws.

(Assignments of Error, No. 17, page 38.)

9. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not in violation of Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of a contract between the plaintiff in error and the defendant in error.

(Assignments of Error, No. 18, page 38.)

10. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, is not repugnant to the Act of Congress of the United States of March 3, 1899 (Chap. 425, Sec. 9, 30 Statutes at Large 1151), in that no plans for the raising or changing of the plaintiff in error's bridge have been submitted to or received the approval of the Chief of Engineers or the Secretary of War.

(Assignments of Error, No. 19, page 39.)

11. The court erred in holding that the alleged action of the defendant in error in regard to plaintiff in error's bridge is not repugnant to the Act of Congress of the United States of June 15, 1866 (Revised Statutes 5258, 14 Statutes at Large 66), in that it deprives the plaintiff in error of its right to carry on its business of interstate commerce transportation as authorized by said Act.

(Assignments of Error, No. 20, page 39.)

12. The court erred in holding that the alleged action of the defendant in error, in regard to plaintiff in error's bridge, does not deprive the plaintiff in error of its property without due process of law and of the equal protection of the laws in that it seeks to compel the plaintiff in error to commit a nuisance and unlawful acts upon the streets of Kansas City, Kan-

sas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

(Assignment of Error, No. 21, page 39.)

13. The decision of the court is in violation of the Fourteenth Amendment to the Constitution of the United States in that it orders and seeks to compel the plaintiff in error to commit a nuisance and unlawful acts in the streets of Kansas City, Kansas, and to commit other unlawful acts by interfering with the property of other persons and corporations.

(Assignments of Error, No. 22, page 39.)

14. The decision of the court denies to the plaintiff in error the rights, privileges and immunities secured to it by the Constitution of the United States, and particularly in Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law, and also deprives it of the equal protection of the laws in these respects, to-wit:

(a) Defendant in error's pleading, filed in the Supreme Court of the State of Kansas, raised questions of fact which were denied by plaintiff in error in proper form, and as required by law. The decision of the Supreme Court of the State of Kansas proceeded to render final judgment without any proper determination of the issues of fact so raised, either by hearing before itself or by reference of such questions to a master or otherwise, contrary to the course of practice and rights accorded to all other litigants.

(b) The decision of the Supreme Court of Kansas grants to defendant in error relief and orders totally outside of the relief prayed for by the defendant in error, and grants such relief, also, on the determination of questions of fact as to which no hearing whatever had been had, either in said court or before a master, contrary to the uniform course of practice and to the rights accorded to all other litigants.

(c) The Supreme Court of Kansas granted final relief to

the defendant in error by assuming that allegations of fact made by the defendant in error were true, although denied by the plaintiff in error, and by assuming as true facts not even alleged by the defendant in error, but facts which were entirely outside of the record in the case, contrary to the uniform practice and custom and to the rights accorded to all other litigants.

(d) The Supreme Court of Kansas by its decision and judgment granted relief which amounts to the destruction and confiscation of the property of plaintiff in error, on disputed issues of fact, without a hearing and without compliance with the forms of law or the procedure required by the Constitution and Statutes of the state of Kansas in every kind and character of litigation.

(e) The decision of the Supreme Court of Kansas, while ostensibly upon the pleadings, in fact determined the issues upon the facts without any opportunity whatever being given to the plaintiff in error to present evidence upon those facts and without any hearing of evidence of any kind or character whatsoever, contrary to the uniform custom and requirements of the state of Kansas and contrary to the rights accorded other litigants.

(Assignments of Error, No. 23, page 39.)

BRIEF AND ARGUMENT.

I.

The order of the Drainage District, and the judgment of the Kansas Supreme Court enforcing it, impair the obligation of the defendant's contract of 1907 with the Drainage District, and also, in view of the contract, deprive the defendant of its property without due process of law.

It is alleged in the alternative writ and admitted in the answer that the Kaw river is navigable.

The defendant's predecessor, all whose property, including its rights under its contract with the Drainage District, is owned by defendant (Rec., p. 9), constructed its bridge across the Kaw river under a dual authority: *first*, under plans expressly approved as to elevation as well as other details, by the Secretary of War and the Chief of Engineers, as provided in Section 9 of the River and Harbor Appropriation Act of March 3, 1899 (30 Stat. L. 1151), and *second*, by express written contract with the Drainage District providing for the construction of this specific bridge according to the plans and specifications thus approved by the Federal authorities, which were attached to the contract. The Drainage District, in this contract, declared the bridge thus to be constructed to constitute a lawful structure. Among the powers conferred upon the Drainage District by the laws of Kansas is the power "to make all contracts and do all other acts in relation to the affairs of the district necessary to the proper exercise of its corporate, legislative or administrative powers and to the accomplishment of the purpose of its organization." (Laws of Kansas 1905, Chapter 215, Section 7, Subdivision 15th.) The bridge therefore was not only a lawful structure under both state and Federal authority, but was constructed under and in pursuance of a contract with the Drainage District, acting under authority of the laws of the state of Kansas, which contract prescribed the elevation of the structure. It is this elevation,

thus fixed, which the Kansas Supreme Court orders to be changed.

After the bridge had been constructed under this dual authority, the Drainage District alone, and without the concurrence of any Federal authority, and acting under an express statutory power, purporting to confer upon it the right to prescribe the elevation of the superstructure of bridges across the Kansas river, determined that the bridge should be elevated approximately 5 feet, and, without notice to the defendant or hearing or opportunity to be heard, made its order (the opinion of the Supreme Court of Kansas assumes that this order was made) requiring the latter at its own expense to elevate its bridge to the prescribed height. It is alleged in the answer, and stands admitted upon this record, that there was no change or alteration in conditions in respect to the bridge or the Kansas river, or anything else intervening, between the Drainage District's approval of the bridge as constructed and its determination to cause the bridge to be elevated.

Upon these admitted facts, it is clear that the obligation of the defendant's contract with the Drainage District is impaired not only by the Drainage District's order, but by the judgment of the Kansas Supreme Court in awarding the peremptory writ of mandamus, which carried into effect and execution the determination of the Drainage District to depart from its contract.

The Drainage District was organized under the laws of Kansas of 1905, Chapter 215, in which the state delegated to the Drainage District legislative functions in respect to the construction of bridges and by Section 7 of that Act undertook to confer upon the Drainage District the power to regulate the length of spans of bridges and the height of their superstructures. The order of the Drainage District, therefore, was the act of the state. (*Walla Walla* v. *Water Company*, 172 U. S. 1.) Not only the order of the Drainage District, but also the judgment of the court declaring the order valid and directing and ordering that it be carried into execution and effect, oper-

ated to impair the obligation of the Terminal Company's contract.

Dobbins v. *Los Angeles*, 195 U. S. 223.
United States v. *Railroad Company*, 134 Fed. 169, 143 Fed. 224.
22 Op. Atty. Gen. 343.
Washington Bridge Company v. *State*, 18 Conn. 53.
Commonwealth v. *Bridge Company*, 2 Gray (Mass.) 339.
Commonwealth v. *Canal Company*, 66 Pa. St. 41.
City of Buffalo v. *Delaware, etc., Company*, 110 N. Y. Supp. 488.

The Drainage District endeavors to justify its act in impairing the obligation of its contract with the defendant by invoking the rule that the state, in the exercise of its police power in the protection of navigation and in the encouragement of drainage enterprises, may require public corporations at their own expense to make alterations in their bridges or other structures.

The cases relied upon by the defendant in error, so far as relevant, and other cases of a similar nature, may be readily classified as follows:

(1) Cases where the bridge was built under some general authority without specific authorization by Congress and changed conditions have rendered it an actual obstruction to navigation.

(2) Cases where the statute of the state or act of Congress specifically authorizing the bridge contained a provision reserving the right to alter, amend or repeal the right granted by a provision that the bridge should not in any way obstruct navigation, and the bridge has actually become an obstruction to navigation by reason of changed conditions.

(3) Cases where the bridge was built under general authority across a public highway or stream, in the nature of a public highway, the charter of the company containing a requirement that it should restore all such highways or streams

to a condition of usefulness, and by reason of a subsequent change in conditions the usefulness of the stream or highway requires the change in the bridge.

Among the cases of the first class are the following:

New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S. 453.

Union Bridge Co. v. *U. S.*, 204 U. S. 364.

Monongahela Bridge Co. v. *U. S.*, 216 U. S. 177.

Among the cases of the second class are the following:

Union Bridge Co. v. *U. S.*, 204 U. S. 364.

New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S. 453.

W. Chicago R. R. Co. v. *Chicago*, 201 U. S. 506.

Bridge Co. v. *U. S.*, 105 U. S. 470.

Among the cases of the third class are the following:

Chicago, etc., Railroad Company v. *Drainage Commisison*, 200 U. S. 561.

Northern Pacific Railway Company v. *Duluth*, 208 U. S. 583.

Cincinnati, etc., Railway Company v. *Connersville*, 218 U. S. 336.

In all of these cases there is present the element of changed conditions arising subsequently to the building of the structure. In none of them was the structure authorized specifically by the authority having control of the stream or highway, unless there was at the same time in the act of authorization reserved expressly, or by reasonable interpretation of the language, the right to make changes in the future.

The only decisions which we have found in the United States courts where an attempt has been made to require a change in a bridge which had been built under specific authority of an act of Congress and in exact compliance with the plans approved by Congress or under its authority, are *United States* v. *Parkersburg Railroad Co.*, 134 Fed. 969, and the same case in the Circuit Court of Appeals reported in 143 Fed. 224

(affirmed by this Court on other grounds, 229 U. S. 244). Both the Circuit Court and the Circuit Court of Appeals held that the bridge could not be changed except under the authority of Congress and with a provision for just compensation.

That the action of the Drainage Board evinces a legislative policy which cannot be arbitrarily or capriciously changed at the expense of the defendant whether or not the contract of 1907 is a permanently binding contract is shown by the case of *Dobbins* v. *Los Angeles*, 195 U. S. 223, *supra*. This was a suit to enjoin the enforcement of a city ordinance. It appeared that the City Council of Los Angeles, in pursuance of authority contained in its charter, passed an ordinance specifying certain parts of the city in which gas works could be erected and prohibiting their erection in other parts of the city. Shortly after the enactment of the ordinance the plaintiff began the erection of gas works in the permitted zone. After he had expended money in getting ready to build and had made some excavation and laid foundations for the purpose, the council passed another ordinance changing the zone within which gas works were permitted and including the place where plaintiff was building in the prohibited zone. The time which had elapsed since the passage of the ordinance was only about three months and it did not appear there had been any changes in conditions in the meantime. The Supreme Court held that the second ordinance was in violation of the Fourteenth Amendment. The court lays particular stress on the fact that there had been no change in conditions which could call for a change in the treatment of the situation by the council. Mr. Justice Day in his opinion says:

> "Applying the principles settled by these decisions to the allegations of the bill, admitted by the demurrer, we think a case is made which called for the protection of the courts against arbitrary interference with the rights of the plaintiff in error. *Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gas-works in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the*

works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California Supreme Court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, *by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good. Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672. But the exercise of the police power is subject to judicial review and *property rights cannot be wrongfully destroyed by arbitrary enactment.* * * * In November, *without changed conditions or adequate reason*, the council by an amended ordinance drew a line embracing a part of the district including the complainant's property, and declared that, too, shall be prohibited territory. * * * In this case we think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the *court may restrain the arbitrary and discriminatory exercise of the police power* which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment of the Federal Constitution."

See also *Grand Trunk Western Railway Company* v. *South Bend*, 227 U. S. 544; *Owensboro* v. *Cumberland Telephone Company*, 230 U. S. 58.

It matters not whether the result is based upon the prohibition against the impairment of the obligation of contracts, the prohibition against capricious, arbitrary and unreasonable requirements, embodied in the Fourteenth Amendment, or the

principle of estoppel recognized by this Court in *Lewis Blue Point Oyster Company* v. *Briggs*, 229 U. S. 82, l. c. 89. The salient point is that the Drainage District cannot, in order to accomplish a certain result (presumably flood protection), authorize and permit the defendant to incur on the faith of its Drainage District's own determination the enormous expense involved in building a bridge, and then without any change in conditions, or any necessity, but arbitrarily and capriciously (the allegations of the answer must be taken to be true in this regard) impose upon the defendant an additional and burdensome expenditure, and in addition compel it to take a course of action which would, as alleged in the answer, compel the defendant to commit unlawful acts and violate the rights of the city of Kansas City, Kansas, and of other railway companies and private property owners.

II.

Regardless of the contract of 1907, the order of the Drainage District, and the judgment of the court enforcing it, deprive the defendant of its property without due process of law and deny it the equal protection of the laws.

(a) To comply with the order and the judgment of the court, the defendant must either suffer a disruption of its line or itself commit unlawful acts and violate property rights of others.

The defendant cannot elevate its bridge without also elevating the approaches, for, "a railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots and other facilities for the public accommodation." (*Union Pacific Railroad Company* v. *Mason City Railroad Company*, 222 U. S., l. c. 245.)

The act of June 15th, 1866 (14 Stat. L. 66)), provides:

> "Every railroad company in the United States whose road is operated by steam, its successors and assigns, is

hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination."

This is the defendant's franchise for conducting interstate transportation. The right thus granted by Congress derives its authority from the commerce clause of the Federal Constitution. It is altogether independent of state action. State action is powerless to interrupt its operation. If the Drainage District had arbitrarily ordered the removal of the bridge, as it in effect did, would there be any question of its invalidity, insofar as the flow of interstate commerce over the tracks of the railway company was thereby destroyed? Concede for the sake of argument, which we do not admit, that the state of Kansas, with the concurrence of the Federal authorities, has the power to cause the defendant's bridge to be elevated at its expense. Yet, it does not follow that this right can be so arbitrarily exercised as to work the dismemberment of an interstate carrier. (*In re Debs*, 158 U. S. 564.)

On the one hand, the city authorities of Kansas City, Kansas, say, "We will not elevate the streets so that you may elevate your tracks as they approach the bridge when raised to the required height; if you undertake to interfere with the public streets of our city, we will enjoin you or prosecute you." On the other hand, the Drainage Board says: "True, you have no right to reconstruct your tracks in public streets so as to reach the bridge elevated to the height which we require, but, nevertheless, you must elevate."

True it is that the railway company must exercise its rights derived from the Federal Constitution and laws with due regard to a proper exercise of the police power of the state. Where, as in this case, the Drainage District fixes the height of the rails of the defendant at 342.73 feet above the St. Louis Directrix, and the city of Kansas City, Kansas, fixes

the height of its rails at 4.96 feet below that elevation, it is not a reasonable police regulation of the state of Kansas to compel the railway company to conform to both requirements. If the Drainage District can maintain a writ of mandamus to compel the railway company to conform to the elevation fixed by it, it would be equally competent for the city of Kansas City, Kansas, to maintain a mandamus suit against the railway company to compel it to adjust its rails to the elevation required by it.

The Supreme Court of Kansas sought to avoid the effect of this dilemma by saying:

> "As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the assent of the other interested parties, and *it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs.* Such other interested parties cannot well put themselves in the attitude of unreasonable hostility to the orders of this court or to the welfare of the people composing the Drainage District, and it cannot be presumed they will do so." (Rec., p. 30.)

In other words, the court does not decide that the defendant would have a lawful right to comply with the Drainage District's order and to construct approaches over the streets of Kansas City, Kansas, without its consent, or to construct its approaches so as to disrupt the lines of connecting railroads. It admits, in effect, that action on the part of the city and of these connecting railroads is a condition precedent to defendant's compliance with the Drainage District's order, but it requires the defendant to proceed notwithstanding the Drainage District has not, in its order or otherwise, protected the defendant or made its obligations dependent upon these conditions precedent having taken effect. It is no answer to say that the citizens of Kansas City, Kansas, who own property

abutting on the streets which will be affected and the railroad companies who own lines of railroad crossing defendant's line are likewise subject to the orders of the Drainage Board and will have to comply with the Drainage District's orders. They are not parties to this case and *they* also are entitled to their day in court and to be heard on the question whether or not they are bound to comply with the Drainage District's orders. This defendant cannot, even in obedience to an order of the Drainage District, determine their rights for them, or proceed regardless of them. It is likewise no answer to say, as the court says, that it cannot be presumed that they will "put themselves in an attitude of hostility to the orders of this court or to the welfare of the people composing the Drainage District." The law itself, or in this case, the order of the Drainage District, must "save the parties' rights, and not leave them to the discretion of the courts as such" (*Louisville and Nashville Railroad Company* v. *Stock Yards Company*, 212 U. S. 132, l. c. 144), and "to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay." (*Missouri Pacific Railway Company* v. *Nebraska*, 217 U. S. 196, l. c. 205.) It is also no answer to say that the order of the court as finally entered did not require the raising of the bridge and therefore did not require the building of the approaches on the city streets. The other horn of the dilemma thereby created is worse than the first. If the order of the court does not indirectly order the raising of the bridge and the building of approaches, it amounts to a direction to defendant to destroy the bridge entirely and remove all piers and other parts of it. This total destruction of the defendant's property, without any necessity whatever (the entire advantage to be gained, even in the view of the Drainage District, being accomplished by the raising of the bridge) obviously would deprive the defendant of its property without due process of law.

(b) No hearing prior to the Drainage District's order.

It appears by inference from the pleadings (since the defendant denied generally the allegations in regard to formal action by the Drainage District) that the Drainage District issued the order (if it was issued) requiring the raising of the bridge to the designated elevation without any hearing or opportunity to be heard on the part of the defendant. This in itself, regardless of the ultimate reasonableness of the order, amounts to a denial of due process of law. As is said by this Court in *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, l. c. 91:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi*-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

The act of the legislature of the state of Kansas under which the Drainage District acted, if it did act (Chapter 215, laws 1905, Sec. 7), which specified the powers of the Drainage District, did not provide for any hearing before the District or its officers prior to action taken. The act of the Drainage District, therefore, in ordering the raising of the bridge without notice or opportunity to be heard, was a taking of property without due process of law.

(c) Drainage District's order arbitrary.

The answer denied that there was any necessity for the raising of the bridge and expressly alleged that there had been no change in conditions since the construction of the bridge which called for a change in legislative policy regarding it, but that the action of the Drainage District was on the contrary arbitrary, capricious and unreasonable. Regardless of any contract, the action of the Drainage Board under these allegations must be held violative of the Fourteenth Amendment. (See authorities under Point I, *supra*.)

III.

The assent of the Chief of Engineers and of the Secretary of War to the modification in the plans of the bridge involved in its elevation has not been secured. The raising of the bridge without this assent would violate an act of Congress.

Section 9 of the Act of March 3, 1899, in pursuance of which the bridge was built (30 Stat. at Large, p. 1151, 6 Fed. Stat. Annot. 805), is as follows:

> "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: Provided, that such structures may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: And provided further, That when plans for any bridge or other structure have been approved by the Chief of Engineers and of the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

This statute makes it clearly unlawful for any change to be made in the bridge without the approval of the Chief of Engineers and Secretary of War having been *first* obtained. Compare *Cummings* v. *Chicago*, 188 U. S. 410; *Montgomery* v. *Portland*, 190 U. S. 89.

Mandamus certainly cannot lie to compel the defendant to violate an act of Congress.

The answer alleged that the assent of the Chief of Engineers and of the Secretary of War, as required by the act of Congress, had not been secured. The right to have the bridge remain in its present condition until these Federal authorities shall authorize the reconstruction or elevation thereof and approve the plans therefor, is a right, privilege and immunity conferred by the laws of the United States of which the defendant is clearly deprived by the order of the Drainage District and the judgment of the Kansas Supreme Court.

If the judgment of the Supreme Court of Kansas is of any validity whatsoever, it must necesasrily be upon the assumption that the peremptory writ, in effect, commands the elevation of the bridge to the required height, since that was the only question upon which the court was authorized to pronounce judgment. The court said (Rec., p. 30):

> "The real object (of the plaintiff) is to clear the channel up to the height mentioned, from obstructions, the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants rather than the plaintiff are vitally interested.
>
> While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas river all obstructions of every kind, etc."

The court does not order the elevation of the bridges, because confessedly it has not the power to do so, until the Federal authorities shall have approved the plans. It seeks, however, to accomplish the same result in this round-about way; but it is obvious to anyone that if the approval by the Federal authorities is necessary for the elevation or rebuilding of the bridge, it must be equally necessary for the removal of obstructions in the river *which can only be accomplished by the elevation or rebuilding of the bridge.* What cannot be done directly, cannot be done indirectly.

IV.

The judgment of the Supreme Court of Kansas and the proceedings therein amount in themselves to a denial of the equal protection of the laws and a deprivation of property without due process of law.

The allegations in the alternative writ of mandamus were denied under oath, except the allegations that the plaintiff was a public corporation; that the defendant was a railway company; that the Kaw river was a navigable stream and flowed through the Drainage District; and that the defendant owned a bridge (Rec., p. 5). Among the allegations of the alternative writ denied are those in regard to the flood of 1903; those as to the coincidence of the levee line established by the Drainage Board with the harbor line established by the Federal government; that the Drainage District had in fact, by any formal action, notified or ordered the defendant to raise its bridge on April 18, 1911; and that the removal of the so-called obstructions was "absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said elevations obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants." (Rec., p. 1.) In other words, the essential facts upon which the authority of the Drainage Board to act could be based, if it could act at all, and even the fact that it did act formally, were all denied under oath by the defendant.

The affirmative allegations in the defendant's verified answer were admitted, since the case was submitted on a motion for judgment on the pleadings. No evidence was introduced. In other words, the case was as if submitted to the court on an agreed statement of facts embodying the affirmative allegations of the defendant's answer and the negative of the allegations of the alternative writ (with the exception of the two or three admitted facts above referred to).

How could the court, having regard for the usual forms

of judicial procedure, pronounce judgment for the plaintiff? It could only do so upon the assumption that the allegations in the alternative writ, which were denied by the defendant, imported absolute verity. No such provision is contained in the Kansas statutes regulating proceedings in mandamus. (Sections 6310, 6321, General Statutes of Kansas, 1909.) If any such provision were attempted to be enacted, it would be void.

The Kansas Supreme Court states (Rec., p. 24): "We can only consider the case upon the allegations contained in the writ and in the answer and return." How could the court lawfully consider the allegations in the writ and assume them to be true without evidence, when they were denied in the answer, which was under oath? But the court is not content with finding the allegations of the alternative writ to be true, although denied and unsupported by evidence, but has recourse (Rec., p. 25) to "certain blue prints or maps," the annual report of the chief of engineers, and a report with map and descriptions of harbor lines, etc. The court also refers to an allegation in regard to a flood in 1908, which must have been made orally as it is not contained in the pleadings. (Rec., p. 26.)

Furthermore, the Supreme Court of Kansas, by a curious process of reasoning, finds itself unable to make permanent the alternative writs of mandamus in respect to the elevation of the bridge, and therefore issues a mandamus to do something else. It specifically holds that it has no power to order the elevation of the bridge, until plans therefor have had the approval of the Federal officers, as required by act of Congress, saying:

> "There is nothing in this decision (*Cummins* v. *Chicago*, 188 U. S. 410) indicating that a bridge across such waters can be lawfully erected or *reconstructed*, until the plans therefor are approved as required by the Act of 1899. It is familiar doctrine that, when Congress has legislated upon a subject within its power, such legislation is binding upon the states, and for us to hold now that

the defendant can be compelled by mandamus to raise its bridge as demanded, without obtaining the approval of the plans therefor as required by Congress, would be to disregard rather than to obey such legislation." (Rec., p. 28.)

The court finds, therefore, that it cannot lawfully grant the relief prayed for. The command of the alternative writ was "that you raise and elevate your bridge known as the Belt Line bridge over the Kansas river 4.96 feet, or so that the lowest part of the superstructure will be 342.73 feet above the St. Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed, or that you appear before the Supreme Court of Kansas, etc." The Kansas Supreme Court in the language above quoted, held that it had no power to grant this specific relief, which was all the relief asked for in the alternative writ, but undertook to do by indirection what it could not do by direction. It could not grant the relief claimed, because the law prohibited it from so doing, but it adopted the expedient of issuing the peremptory writ to the defendant commanding it, *not* to elevate its bridge, but to remove "all obstructions" of every kind, and to clear the channel to a point which corresponds to the height to which it was to elevate the bridge. The removal of "all obstructions" beneath the specified elevation, naturally and necessarily means that the piers must be removed from the river and the superstructure destroyed.

In other words, the court said in the alternative writ:

"Raise your bridge to the required height, or show cause why you should not be compelled to do so."

In the peremptory writ it says:

"Tear out your bridge, piers, abutments, and superstructure, everything below the prescribed elevation."

The result is that the defendant is haled into court to meet a cause of action and does meet it fairly, in the opinion of the court. That ought to end the proceedings. But the court then proceeds to pronounce judgment against the defend-

ant upon another and different cause of action, one theretofore not mentioned in the papers or pleadings, and one which the defendant had no reason to anticipate that it would be called upon to meet. If the court had gone a step further, and while passing upon the rule to show cause why the bridge should not be elevated, had proceeded to order the defendant to remove all of its railway and road-bed from the state of Kansas, it would not be contended that such a judgment constituted due process of law; and yet, while the illustration is an extreme one, the principle is precisely the same. It is submitted that the action of the Kansas Supreme Court is so contrary to the practice customary in such cases, and so regardless of the rights of the defendant that it must be considered by this Court as subversive of all of the usual recognized principles of jurisprudence, and so arbitrary as to amount to a deprivation of the property of the defendant without due process of law, and a denial to it of the equal protection of the laws.

That the prohibitions of the Fourteenth Amendment refer to and control all branches of the state government, legislative, executive and judicial, is so well settled at this late date as hardly to merit assertion. *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278; *Chicago, etc., Railroad Company* v. *Chicago*, 166 U. S. 226; *Blake* v. *McClung*, 172 U. S. 239, 260; *Scott* v. *McNeal*, 154 U. S. 34, 35; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Ex Parte Virginia*, 100 U. S. 339, 346.

In *Chicago, B. & Q. R. Co.* v. *Chicago, supra*, Mr. Justice Harlan says in the opinion, page 233:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a state government, deprives another of any right protected by that Amendment against depravity by the state, violates the constitutional inhibition, and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or, as we have often said, the constitutional prohibition has

no meaning and the state has clothed one of its agents with power to annul or evade it."

While the line of demarcation between the two conceptions, "equal protection of the laws" and "due process of law," is not always clearly defined and the two frequently overlap, yet in the present instance we rest our contentions with reference to them on wholly different and distinct considerations and shall treat of each contention separately.

(a) The method of procedure followed by the Supreme Court of Kansas in this case was different from that which would or could be lawfully applied to any other person in the state in a similar case, and denied to defendant the equal protection of the laws.

In *Tinsley* v. *Anderson*, 171 U. S. 101, this Court, in overruling the contention that a certain procedure in a state court denied to defendant the equal protection of the laws, said, page 106:

> "The right to the equal protection of the laws was certainly not denied, for it is apparent that *the same law or course of procedure* which was applied to Tinsley *would have been applied to any other person in the state of Texas, under similar circumstances and conditions;* and there is nothing in the record on which to base an inference to the contrary."

Similar statements are to be found in *Minder* v. *Georgia*, 183 U. S. 559, and in *Andrus* v. *Insurance Association*, 168 Mo. 151, 162.

The converse of the proposition stated in the above cases would seem necessarily to follow, and is, in fact, laid down as the rule in *Ex Parte Stricker*, 109 Fed. 145, 150:

> "The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not and could not lawfully be applied to any other person in the state under similar circumstances."

Section 6318 of the Revised Statutes of Kansas of 1909 provides, with reference to the procedure to be followed in mandamus proceedings:

> "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, and are to be construed, and may be amended, in the same manner as pleadings in a civil action; and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

In the case of *Crans* v. *Frances*, 24 Kan. 750, Mr. Justice Brewer, in commenting upon the effect of the statutory provisions, said:

> "The entire nature of this proceeding (mandamus) is, as we have had occasion heretofore to notice, changed by statute. It is now, in its form, very like an ordinary action. No other pleadings are allowed than the writ and answer. These pleadings are to be construed, and to have the same effect, as proceedings in a civil action, and the issues are to be tried, and further proceedings had, as in a civil action."

In the present case all of the material allegations in the alternative writ stood denied by defendant's answer. Can it be doubted that in any other civil action, or in any other mandamus suit, plaintiff would have been required to support them by some proof before it would be awarded the final relief prayed for?

In the present case defendant's answer, by its affirmative allegations, raised several issues of fact, which have already been referred to. Can it be doubted that in any other civil action, or in any other mandamus suit, the court would have permitted the defendant to offer evidence in substantiation of such allegations, instead of taking as true the contrary and controverted allegations of the plaintiff?

It should be emphasized here that the court did not hold that the defenses set up by defendant, if true, would not in law be sufficient to defeat the action (except the defense under

the contract of 1907 and the defense based upon interference with the streets of Kansas City, Kansas, and other railway companies); if it had so held, then there would doubtless be no force in our contention that its method of procedure denied defendant the equal protection of the laws, however vulnerable its judgment might be on other grounds. The fact is, the court either ignored them or assumed the allegations of the answer in regard to them to be untrue and the allegations of the alternative writ to be true. The following is the only reference in the opinion to the validity of the defense based upon the arbitrary character of the Drainage District's action (Rec., p. 26).

> "The allegation of the plaintiff is that the flood of 1908 made it necessary to elevate the bridge as demanded, while the allegation of the defendant is that the requirement is arbitrary and capricious. As the plaintiff is a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods, it must be presumed that its officers are acting in good faith and with sufficient cause and reason, and that *prima facie* at least, their conclusion as to present requirements is correct."

Whether or not the court erred in holding, in the absence of a statute so providing, that in a suit brought to enforce its own orders, plaintiff would be presumed to be acting within reason and in good faith, it is not necessary to discuss here. That could not obviate the necessity of giving defendant the opportunity to overcome this presumption by proof. It could only operate to shift the burden of proof to defendant.

The court *says* that the Drainage District's determination is *prima facie* correct, but *makes* it in practical effect *conclusive*, since defendant was not allowed to offer evidence. How could it give [illegible] *prima facie* effect to a supposed determination of the Drainage District, when there was no evidence before it that the Drainage District had determined anything or acted at all in its corporate capacity, and the allegation that it had done so was denied?

The laws of Kansas make the orders of its Railroad Commission *prima facie* reasonable in all proceedings brought in the courts to enforce them. This, however, is not sufficient to prevent defendant from setting up in its answer in the Supreme Court to an alternative writ of mandamus issued therefrom that, as a matter of fact, a particular order of the commission which is sought to be enforced is arbitrary and unreasonable; and is not sufficient to prevent defendant from obtaining an inquiry into the issue of fact thus raised. This much, at least, is to be gathered from the decision of the Kansas court in the case of *State* v. *Missouri Pacific Railway Company*, 92 Pac. 606, which was affirmed by this Court in *Missouri Pacific Railway Company* v. *State*, 216 U. S. 262.

Again, the citation in the alternative writ commanded defendant to raise its bridge to a certain elevation or appear on a certain day and show cause why it should not do so. Defendant chose the latter alternative, made its appearance and gave as one reason why its bridge should not be raised the fact that this could not be done without the consent of the Chief of Engineers and the Secretary of War of the United States, which had not been gained (Rec., p. 9). This the court itself, in its opinion, held to be an insuperable obstacle to the enforcement of the command of the writ. (Rec., p. 28.)

In spite of this, however, the court proceeded to enter a final order commanding defendant to do an entirely different thing, something not mentioned in the citation, something about which defendant was given no notice and concerning which it had no opportunity to be heard. Defendant was ordered to remove its bridge absolutely—piers and all—not merely to elevate it. Is it imaginable that such a course of procedure would have been applied to any other person in the state of Kansas in any other civil action, or in any other mandamus proceeding?

This case was set down by the court for argument on the pleadings. It is said in the opinion (Rec., p. 24):

"The plaintiff withdrew its reply and moved for judgment on the pleadings, and although in the brief there is a long detailed statement of alleged facts, we can only consider the case upon the allegations contained in the writ and in the answer and return."

In spite of this fact, however, it appears from the court's opinion (Rec., p. 25) that plaintiff submitted at the argument certain maps and papers in support of the allegations of the alternative writ, and that the court gave careful consideration to them. Will it be pretended that such a course of procedure would have been followed with any other case?

It would thus appear unnecessary to go further in an effort to show that *the method of procedure we here criticise was one which never has been and never could be lawfully applied to any other person in Kansas in a similar case*, and that it denied to defendant the equal protection of the laws within the meaning of the prohibition contained in the first paragraph of the Fourteenth Amendment.

(b) The method of procedure adopted by the Supreme Court of Kansas in this case violated fundamental rights secured to defendant by the law of the land, and operated to deprive it of its property without due process of law.

The foregoing argument with reference to a denial of the equal protection of the laws is predicated upon the fact that the procedure complained of was contrary to that accorded other litigants. It will be our contention here that the procedure followed by the Kansas Court in this case was one which could not have been authorized by the State, even though its constitution expressly provided for it. It is said in *Rawlins v. Georgia*, 201 U. S. 638, 640:

"If the State constitution and laws as construed by the state court are consistent with the Fourteenth Amendmend, we can go no further. The only question for us is whether a state could authorize the course of proceed-

> ings adopted, if that course were prescribed by its constitution in express terms."

It can make no difference for the purpose of our argument here whether the procedure adopted by the Kansas court was one authorized by the laws of the state, or one merely arbitrarily adopted by the court for this particular case, for, as we have already seen, the Fourteenth Amendment controls the judicial no less than the legislative branch of the state government.

We quote from the opinion of this Court in the case of *Hovey* v. *Elliott*, 167 U. S. 409, 417:

> "How can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the constitution?"

However careful this Court has been in the past to avoid an attempt at precise definition of "due process of law," always preferring the wiser course of working out its full intent and application "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded" (*Davidson* v. *New Orleans*, 96 U. S. 97), still it has never hesitated to include the presence of notice and hearing as a fundamental and essential element, if not, indeed, as constituting the very essence of "due process." This is one of the fundamental conceptions of the phrase embodied in Mr. Webster's famous definition, although it would seem that the idea was by no means original with that great advocate. We find in the opinion by Fortescue, J., in *Rex* v. *Cambridge University*, 1 Stra. 558, 567:

> "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defense. Adam (says God), where art thou? Hast thou

not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

The decisions of this Court in which the same principle has been announced are almost too numerous to mention. We shall merely cite: *Ochoa* v. *Hernandez*, 230 U. S. 139, 161; *Hooker* v. *Los Angeles*, 188 U. S. 314, 318; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Hovey* v. *Elliott*, 167 U. S. 409, 414; *Holden* v. *Hardy*, 169 U. S. 366, 389; *Londoner* v. *Denver*, 210 U. S. 373, 385.

We desire it understood that we are not here attacking, *sub nomine*, the action by which plaintiff sought to procure the enforcement of its orders; that is, we are not contending that *mandamus* was an improper remedy because defendant was entitled to have the issues of fact raised by the pleadings tried before a jury. Nothing of that sort is in mind. We are aware of the principle laid down by this Court many times and expressed thus in *Hooker* v. *Los Angeles*, 188 U. S. 314, 318:

> "The Fourteenth Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, *if the method adopted gives reasonable notice and affords a fair opportunity to be heard.*"

It is exactly on the ground expressed in the words which we have italicized in the above quotation that we assail the method of procedure applied by the Kansas court in this case. Our contention is that *it did not give reasonable notice and a fair opportunity to be heard.*

Mr. Justice Bradley said in *Davidson* v. *New Orleans*, 96 U. S. 97, 107:

> "I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property, and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the

> power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

It is to be noted that the Kansas Act (L. 1905, Ch. 215, G. S. 1909, Art. 3, Ch. 34), from which the plaintiff derives its authority, makes no provision whatever for notice and hearing as a prerequisite to the exercise by plaintiff of its powers. The only possible theory, then, upon which the Act could be held valid, is that the person interested may always secure a hearing by contesting the validity of any order of the Drainage Board in the courts. *Chicago, etc., Railway Company* v. *Minnesota*, 134 U. S. 418. The Act nowhere attempts to make the findings of the Drainage Board conclusive on the courts, and the court in this case did not pretend to put any such construction upon its provisions.

It appears by inference from the pleadings that the Drainage District did not give defendant any opportunity to be heard before determining upon the alleged necessity of making the change demanded in defendant's bridge. The question now is whether or not a fair opportunity of being heard was accorded defendant by the Kansas Supreme Court. This may be determined, we think, by considering its treatment of only one of the issues raised by defendant's answer, that of the reasonableness of plaintiff's demands.

In *Missouri Pacific Railway Company* v. *Nebraska*, 217 U. S. 196, this Court said in its opinion, page 206:

> "It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government, the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away."

One of these limitations upon the exercise by the state of its police power, through any of its instrumentalities, is that its action must be reasonable and not arbitrary, and whether or not it is so in any case where its validity is challenged on this ground is always a question of fact to be inquired into by the court and determined in the light of all the circumstances.

Chicago, etc., Railroad Company v. *Ill.*, 200 U. S. 561.
Chicago, etc., Railroad Company v. *Chicago*, 166 U. S. 226.
Dobbins v. *Los Angeles*, 195 U. S. 223, 235, 239.

This Court said in *Chicago, B. & Q. R. Co.* v. *Illinois*, *supra*, page 592:

> "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. * * * If the means employed have no real, substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber*, 136 U. S. 313, 320."

It can make no difference in the present case that the police power is here ostensibly invoked in behalf of the public safety, for this power is the same and is subject to the same tests for its validity whether invoked for the protection of the public health, safety and morals, or merely the advancement of the general convenience and well-being of the community. *Lake Shore Railroad Company* v. *Ohio*, 173 U. S. 285, 300; *Bacon* v. *Walker*, 204 U. S. 311.

In the present case defendant's answer denied that there was any reasonable necessity for the action sought to be enforced by the Drainage District, as alleged in the alternative

writ, but asserted that, on the contrary, there had been no change in conditions; that the Drainage District's demand that it elevate its bridge was *unreasonable* and *arbitrary*, and that its enforcement would deprive defendant of its property without due process of law and deny it the equal protection of the laws.

To say that the mere permission to argue the case orally and to file a brief herein, which is all that was granted defendant, amounted to a hearing within the meaning of that term as used by the courts when giving it as an essential element, is "due process of law," is absolutely to disregard the substance and lean upon the mere form of the word. As this Court said in *Washington* v. *Fairchild*, 224 U. S. 510, 524, speaking of a contention made against a statute of Oregon that it was invalid because it did not provide for notice and hearing:

> "If this were true, the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

As pointed out in our preceding argument, there was no determination of this issue raised by defendant's answer; the court practically ignored it both in its statement of the pleadings and in its decision of the case. This was an issue properly before the court on the pleadings; due process of law would require that it be determined before judgment could be rendered.

The action of the court in its treatment of this issue was as though it had struck down defendant's answer of its own accord and proceeded to judgment as on confession. Defendant here was not even in contempt of the court as was the case in *Hovey* v. *Elliott*, *supra*, yet this Court refused to sanction any such procedure in that case, saying, page 446:

> "There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files."

Defendant here was not even an alien enemy as was the case in *Windsor* v. *McVeigh*, 93 U. S. 274, and *McVeigh* v. *U. S.*, 11 Wall. 267, yet this Court, in the strongest terms, condemned such a method of procedure in those cases, saying in its opinion in the former, page 277:

> "A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, 'Appear, and you shall be heard'; and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.' In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

We have said that the necessary element of notice also was lacking in the form of procedure adopted by the Supreme Court of Kansas. This is apparent when we consider the variance between the citation of the alternative writ and the final order of the court, as pointed out in our preceding discussion of this feature.

Going back to the test with which we started out in our argument upon this phase of the case, is it conceivable that a state could authorize the course of procedure adopted in this case, even though that course were specifically authorized by its constitution? Could a state authorize a procedure by which a person being haled into court to show cause why he should not be deprived of his property is yet not permitted to prove

the existence of facts which present an unquestioned reason why his property should not be taken? Or could a state authorize a procedure under which a party has been notified to appear in court and show cause why he should not be required to do a certain act, and then, after he has shown *to the satisfaction of the court* why he cannot lawfully be required so to do, nevertheless, without further notice and without opportunity to be heard further, is ordered by the court to do a wholly different thing?

Unless the above questions can be answered in the affirmative, then the method of procedure followed by the Kansas court in the present case, whatever kind of process it may have been, was not "due process of law" within the meaning of that term as heretofore construed by this Court.

We respectfully submit that the judgment of the Supreme Court of Kansas must be reversed.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
JAMES M. SOUBY,
For Plaintiff in Error.

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In the Supreme Court of the United States

October Term, 1913.

THE KANSAS CITY TERMINAL RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF KANSAS.

No. 314.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

The overflows of the Kansas river occurring at Kansas City in 1903 and 1904 demonstrated the necessity for the improvement of the Kansas river and the regulation by the public of the construction and maintenance of bridges thereover.

The Kaw Valley Drainage District of Wyandotte County, Kansas, hereinafter referred to as the Drainage District, was incorporated in 1905 under the provisions of Chapter 215 of the Session Laws of Kansas for 1905, the same being sections 3000 to 3056 of the General Statutes of Kansas of 1909.

The Kaw Valley Drainage District is a public corporation invested by the state (subject to the jurisdiction of the United States as to navigation only) with the exclusive control of the portion of the Kansas river within its limits. Said district is expressly authorized to control and regulate the use and improvement of said river, including the construction and maintenance of bridges.

The Statutes Defining Powers of the Drainage District.

Section 3006, General Statutes of 1909, provides:

> **"3006. General Powers of District.** That each drainage district incorporated under the provisions of this act shall be a body politic and corporate and (subject to the superior jurisdiction of the United States over navigable waters) is hereby granted *exclusive control* of the beds, channels, banks and of all lands the title to which is vested in the state of Kansas, lying between the banks at high water mark, of all natural water courses within such district. And every drainage district so incorporated shall have power * * *.
>
> "*Second*, To sue and be sued in its corporate name * * *.
>
> "*Fourth, To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to* so widen, deepen, establish, *regulate and maintain the channels thereof*, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or

lessen the volume thereof or the injury deemed likely to result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *

"*Fifth*, To prescribe, regulate *and fix the height of the superstructures above the water*, the length of all spans and the location of the piers of *all bridges* across water courses situated in the district.

"*Sixth*, To construct levees across the rights-of-way, road-beds, tracks and lands of railroad companies and street railroad companies, and to condemn and appropriate by the exercise of the right of eminent domain in the manner hereinafter provided sufficient of such rights-of-way or other lands of any such railroad company or street railroad company as may be necessary for the purpose of constructing and maintaining a continuous levee of uniform height across the same.

"*Seventh*, To fix, regulate *and change the grade or elevation of all public highways, railroads* and street railroads at points where any levee may cross or intersect the same.

"*Eighth*, To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee, so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural water course.

"*Ninth*, To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing or maintenance in any natural water course of any unauthorized bridge, embankment, pier or other work or structure *constituting to any extent whatever an obstruction to the flow of the water*. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *

"*Fifteenth*, To make all contracts and do all other acts in relation to the affairs of the district necessary to the proper exercise of its corporate legislative or administrative powers and to the accomplishment of the purpose of its organization.

"*Sixteenth*, To do all other acts that may be necessary to carry out and execute the general powers hereinbefore and hereinafter granted, although not hereinbefore specifically enumerated."

"3037. That if it shall be determined by the board of directors of any drainage district that it is necessary to construct any levee across the right-of-way, road-bed or tracks of any railroad or street railroad company or across any street or highway occupied by such tracks and it shall be necessary to raise or elevate such tracks in order to make such levee continuous and of uniform height, such board of directors shall make an order requiring such railroad or street railroad company to raise or elevate its tracks accordingly, specifying in such order the height to which such tracks shall be so raised or elevated and fixing a reasonable time within which it shall be done, and shall forthwith serve a copy of said order upon such company by delivering the same to any officer, agent or employee of such company found within the district, and it shall thereupon become and be the duty of such company to raise or elevate its tracks to conform to the requirements of such order; and upon failure of any such company to perform such duty within the time so fixed, the board of directors shall be entitled to a writ of mandamus to compel the performance of such duty and may bring and maintain a suit in any court of competent jurisdiction to obtain such writ and remedy."

Chapter 172 of the Laws of Kansas, Session of 1911, amendatory of and supplemental to Chapter 215 of the Laws of 1905, provides that, *when harbor lines have been established*

by Federal authority along navigable streams running through drainage districts, that all lands lying between such harbor lines together with a strip forty feet wide on the land side of and contiguous thereto shall be deemed to be necessary for the protection of the health, life and property of the people of the district, and appropriated for such use. Said act provides for the issuing by the governor of the state of a proclamation declaring the appropriation of a strip of land forty feet wide on the land side of and contiguous to such harbor lines; *and such a proclamation was issued as to the Kaw Valley Drainage District by the governor of the state of Kansas on February 3, 1911.*

Section 7 of said Chapter 172 provides:

> "Section 7. That any railroad or railway company having a right-of-way crossing any of the land so appropriated shall not be deprived of an easement for the use of such right-of-way but shall be permitted to retain the right it now has for the purpose of crossing or running along, upon or over such levee; *provided, however, that such use and occupancy shall not interfere with the widening* of such stream and shall not become an obstruction to the flow of the water therein and shall not interfere with the height or otherwise impair the usefulness of the levees to be constructed for the purpose of preventing overflow."

The Commencement of This Suit.

On February 9, 1912, the Drainage District filed its motion and affidavit in the Supreme Court of Kansas for a writ of mandamus against the Kansas City Terminal Railway Company, hereinafter referred to as Company, to compel said Company to raise its Belt line bridge in Kansas City, Kansas, in said Drainage District, so that the lowest point of the

superstructure would would be in elevation 342.73 feet above the St. Louis Directrix, *"and to remove the old bridge, superstructure, abutments, piers, piling and wreckage."* An alternative writ of mandamus was issued by the court, which writ, omitting the caption and formal portions thereof, is as follows:

Writ of Mandamus.

1. The State of Kansas to the defendant The Kansas City Terminal Railway Company, greeting:

2. *Whereas* it has been made to appear to us by affidavit in words and figures as follows:

AFFIDAVIT AND MOTION FOR A WRIT OF MANDAMUS.

3. Comes now the plaintiff and files its motion and affidavit for a writ of mandamus and alleges and shows to the court:

4. That the plaintiff The Kaw Valley Drainage District, Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the state of Kansas.

5. That the defendant The Kansas City Terminal Railway Company is a corporation duly organized and existing according to law.

6. That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1903 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars' worth of property lost by reason thereof.

7. That the Federal Government established harbor lines along said river, which said harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

8. That under and by virtue of the statutes of the state of Kansas the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas river within said District, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

9. That the defendant herein owns a bridge across the Kansas river within the Drainage District which is usually termed "the Belt Line bridge."

10. That heretofore and by virtue of the power in it vested, the plaintiff on or about the 18th day of April, 1911, notified the defendant to raise its said bridge 4.96 feet or to the required height of 342.73 feet above St. Louis Directrix *and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.*

11. *Wherefore*, plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 342.73 feet above St. Louis Directrix *and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage;* that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas river by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such

other and further relief as to the court may seem right and proper.

12. *Now, therefore,* we do command you that upon receipt of this writ that you raise and elevate your bridge known as the Belt Line bridge over the Kansas river 4.96 feet or so that the lowest point of superstructure will be 342.73 feet above St. Louis Directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the state capitol in Topeka, Kansas, on the 20th day of February, 1912, at 2 o'clock p. m. of said day, and show cause by answer filed herein why you will not do so and have you then and there this writ with your return thereon showing that you have complied or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon the writ and answer is hereby set for the 20th day of February, 1912.

At the hearing before the Supreme Court the Drainage District asked and was granted leave to amend the alternative writ by adding thereto the following allegation:

"That since the construction of the bridge and by virtue of a resolution of Congress September 16, 1909, the Secretary of War, through the U. S. Engineering Department, fixed harbor lines and decreed that the defendant's bridge should be raised; that since the erection of the present bridge plaintiff ascertained and determined, after the flood of 1908, the necessity of raising the bridge as demanded and that upon order and request so to raise the same the defendant refused."

The statement of the pleadings set forth in the briefs of the Railway Company in this case is not satisfactory to the

Drainage District. The writ and answer are therefore pleaded at length, so that they may be convenient for the examination of the Court in connection with this argument. The Drainage District contends that the statement of facts as contained in the Railway Company's brief obscures the real matters in controversy before this Court, and that an examination of the pleadings will be necessary to enable the Court to arrive at a correct decision on this appeal.

Return and Answer of the Railway Company to Alternative Writ.

The return and answer of the Railway Company to the alternative writ, omitting the caption, signatures, verification and indorsements and inserting the amendments made to said answer at their proper place therein, and numbering the paragraphs, is as follows:

Return and Answer of the Defendant to the Alternative Writ.

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein says:

1. That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

2. Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905 of the state of Kansas.

3. That the defendant is a railway corporation duly organized and existing according to law.

4. That the Kansas river flows through the Kaw Valley Drainage District.

5. That the defendant herein owns a bridge across the Kansas river within the Drainage District, which is usually termed the "Belt Line bridge."

6. Defendant alleges that it is a railway corporation duly organized under the laws of the state of Missouri, and is a resident and citizen of said state of Missouri, and is not a resident or citizen of the state of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the state of Missouri and from states other than Kansas to and into Wyandotte county and state of Kansas, and from Wyandotte county in the state of Kansas to the state of Missouri and to states other than the state of Kansas.

7. That the defendant's railway tracks extend from Jackson county, state of Missouri, into and through Wyandotte county and state of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the state of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various

Acts of Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

8. That the defendant's railway tracks situated in the state of Missouri extend to and into Wyandotte county, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein and usually called the Kansas City Belt Railway bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Kansas City Belt Railway bridge, *and if* such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

9. Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas river 4.96 feet above their present level and, *if this is done*, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas river since it will be unable to either go onto or off of said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

10. That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, *and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at either end thereof elevated several feet above the present surface of*

defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas.

11. That there is a large amount of private property abutting upon said streets, and improvements erected thereon; that said private property and the improvements thereon would be seriously and permanently damaged by the changing of the grade of said streets which would be made necessary by the elevation of the bridge, and the plaintiff has taken no steps to ascertain the damages to said property or to compensate the owners of said property therefor.

12. That defendant's tracks on the east side of said bridge are intersected by the tracks of the Atchison, Topeka, & Santa Fe Railway Company, and on the west side thereof by the tracks of the Kansas City Southern Railway Company; that if said bridge is raised as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge so raised, the tracks of said other lines of railway intersecting defendant's tracks would be cut in two and rendered useless for service unless the tracks of said other railways should also be raised by their owners; that the plaintiff has not arranged by voluntary agreement with the owners of said other lines of railway to have said tracks raised, or taken any action whatsoever toward having them raised and that the owners thereof refuse to raise the same.

13. That said defendant has no right, power or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

14. That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

15. *It therefore results* that this defendant, while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant, or any adequate protection to the business interests threatened.

16. That such demand of the plaintiff as set forth in the petition and writ herein *is unreasonable, illegal, arbitrary* and beyond the power of said plaintiff to make, and its compliance therewith would require either a total destruction of defendant's business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.

17. Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto if permitted will cost this defendant a sum in excess of thirty thousand dollars, and the

destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

18. That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws, contrary to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8 of Article 1 of the Constitution of the United States.

19. The defendant further says that the plaintiff ought not to have or maintain this action against this defendant for the following reasons:

20. That at the time of making and entering into the contract hereinafter mentioned, the Kansas City Belt Railway Company was the owner of the railway tracks now owned by this defendant and connected its line of railway in Kansas City, state of Missouri, with its line of railway in Wyandotte county, Kansas, by a temporary bridge across the Kansas river upon the same site now occupied by the railway bridge mentioned in the writ herein and known as the Belt Line bridge.

21. That at the time of executing the contract hereinafter set out said Kansas City Belt Railway Company and the plaintiff herein were in litigation in regard to such bridge and other matters connected with the proposed change in the Kansas river.

22. That the said plaintiff and said Kansas City Belt Railway Company being desirous of terminating all controversies in regard to the bridge in question, on the 28th day of May, 1907, entered into a contract in writing of the following import and effect:

23. It was by said parties mutually agreed that the Kansas City Belt Railway Company, in such contract called "the Belt Company," is and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw river to replace the temporary structure, and for that purpose has prepared plans for such permanent bridge duly approved by the chief of engineers of the United States Army and by the Secretary of War.

24. That the Belt Company, desiring to construct said permanent bridge at once, without waiting for the termination of suits pending between the said parties, the Belt Company and the plaintiff agreed to compromise and settle their differences upon the following terms and conditions:

25. *The Belt Company agreed that it would proceed with all practicable speed to construct a permanent bridge across the Kaw river where its temporary bridge was then located, upon and in accordance with plans as shown by a blueprint attached to said contract.* It was further agreed in said contract that said bridge might be, if desired, a double-deck bridge, that the east abutment of said bridge should be placed upon the east harbor line as theretofore established by said Drainage District and as indicated upon the map of Messrs. Tuttle & Pike, engineers of said Drainage Board. That the west pier of the bridge as shown upon the blueprint should be connected with the west bank of the Kaw river by such means, open trestle or other open work, as the Belt Company may elect; but it was further agreed that if at any time hereafter the Drainage District acting under legal authority shall establish a harbor line west of said west pier, then the Belt Company agreed to build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established; and it was further agreed in said written contract that

26. "The Drainage District hereby consents to the construction of said permanent bridge as provided for in the foregoing paragraph and declares that the same when constructed shall constitute a lawful structure, at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter establish."

27. A true copy of said written contract with a true copy of the blueprint which was attached thereto are hereto attached marked Exhibits "A" and "B" and made a part of this return.

28. *Defendant further says that said plan and blueprint attached to said written contract showed and fixed by both words and figures the height at which said permanent bridge should be constructed, and that both parties to said contract were well and fully advised as to the height which said plans showed and said contract fixed for said permanent bridge.*

29. Defendant further says that pursuant to such contract with the plaintiff, said Belt Company did immediately proceed to construct its said permanent bridge, and with all possible dispatch completed the same at an expense of many thousand dollars; that said permanent bridge was constructed in exact accordance with the plans and blueprint attached to said written contract and to the height therein fixed, and such permanent bridge is the bridge mentioned in the alternative writ herein as the Belt Line bridge, and which this plaintiff is now seeking to require this defendant to raise 4.96 feet by this proceeding.

30. Defendant further says that after the making of said contract and after the construction of said Belt Line bridge this defendant by purchase became the owner of all the tracks theretofore belonging to the Kansas City Belt Rail-

way Company and of said Belt Line bridge, and has succeeded to and now possesses all the rights and interest, both legal and equitable, formerly possessed by said Kansas City Belt Railway Company in and to said property and under said written contract.

31. *Defendant further says that since the execution of said written contract and the construction of said Belt Line bridge in accordance therewith no changes have occurred upon said river or in relation to the flow of water therein or in the surroundings of said bridge, no public necessity has arisen which did not exist and was not well known to the plaintiff to exist at the time said contract was executed and said bridge was constructed which rightly and legally require or make necessary a different height for such bridge from that which was fixed in said contract and at which said bridge was constructed.*

32. Defendant further says that if the plaintiff shall now be permitted to require this defendant to raise and reconstruct its said railway bridge in accord with the demand in the petition and writ herein such action will be in violation with the terms of plaintiff's said written contract. Such act upon the part of the plaintiff has no legal justification based upon any changed conditions as an act of public necessity, and the damage to this defendant necessarily resulting from such unwarranted and illegal demand of the plaintiff will amount, if permitted, to a sum exceeding five hundred thousand dollars.

33. *That if such demands* of the plaintiff shall be permitted and its orders that the defendant be required to raise its said railway bridge 4.96 feet above its present height be enforced, then such orders and enforcement are and will be illegal, wrongful, and in violation of the rights of this defendant under Section 12 of Article 1 of the Constitution of the

United States prohibiting the impairment of obligations of contracts.

34. Defendant further says that the plans of the bridge mentioned in the writ herein across the Kansas river, a navigable river wholly within the state of Kansas, showing the full detail of the construction thereof, including the height of the same, were duly presented to and duly approved by the chief of engineers of the United States Army and the Secretary of War before the construction thereof was commenced. That said bridge was constructed in accord with the plans so submitted and approved.

35. *Defendant further alleges that the plans for the modification of said bridge according to the demands of the plaintiff, as set out in the petition and writ herein, have not been submitted to or received the approval of the chief of engineers of the United States Army or the Secretary of War, as provided in Act of the Congress of the United States of March 3, 1899*, being Chapter 425, Section 9 of 30 Statutes, page 1151, and any deviation or modification of the plans of said bridge and any change therein without such submission and approval by the chief of engineers and the Secretary of War will be unlawful, and any order or demand made by the plaintiff requiring changes to be so made in defendant's bridge without first obtaining the approval of the chief of engineers and the Secretary of War violate the laws of Congress in relation thereto and are nugatory and void, and the defendant cannot comply with the demands of the plaintiff as set out in the writ herein without violating the national law above referred to.

36. Plaintiff herein has no power or authority under the statutes of the state of Kansas, or otherwise, to require the defendant's bridge, which is now built and in use, to be raised."

Exhibit "A."

Agreement, made this 28th day of May, 1907, between Kaw Valley Drainage District, of Wyandotte county, Kansas, hereinafter called the Drainage District, party of the first part, and The Kansas City Belt Railway Company, a corporation organized and existing under the laws of the states of Kansas and Missouri, hereinafter called the Belt Company, party of the second part; *Witnesseth That:*

WHEREAS, the Belt Company owns and operates a line of railway extending from Jackson county, Missouri, into Wyandotte county, Kansas, and crossing the Kaw river by a temporary bridge which is claimed to be within the limits of the Drainage District, said temporary bridge being one constructed and now used by the Belt Company to replace the permanent bridge destroyed in the flood of June, 1903; and

WHEREAS, the Drainage District claims that it has the power and right under the laws of the state of Kansas to determine the width of the Kaw river where said bridge is located, and to prescribe the length and method of construction of bridges spanning the Kaw river within the limits of said District; and

WHEREAS, the Belt Company denies such right and power on the part of the Drainage District, and its trustee under its first mortgage has a suit now pending in the United States Circuit Court at Topeka, Kansas, against the Drainage District, the general object and purpose of which suit is to have declared null and void the laws of the state of Kansas under which the Drainage District has undertaken to act, and to have annulled and set aside the proceedings had and taken by the Drainage District wherein it has undertaken to act under such controverted powers, and to enjoin the Drainage District from issuing any bonds; and

WHEREAS, the Belt Company is and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw river to replace said temporary structure, and for that purpose has prepared plans for such permanent bridge, and the same have been duly approved by the chief engineers of the United States Army and by the Secretary of War, but said plans are unsatisfactory to the Drainage District, and it has now pending a suit against the Belt Company to enjoin the construction of such permanent bridge in accordance with said plans; and

WHEREAS, the Belt Company desires to construct said permanent bridge at once, without waiting the determination of said suits or other litigation of a similar nature, and the parties hereto have agreed to compromise and settle their differences upon the terms and conditions hereinafter named;

Now, therefore, it is mutually agreed by and between the parties hereto as follows, to-wit:

1. The Belt Company agrees that it will proceed with all practicable speed to construct a permanent bridge across the Kaw river where its temporary bridge is now located upon and in *accordance with plans as shown by the attached blueprint;* that said bridge may be double-deck, double-track bridge, if desired; that the east abutment of said bridge shall be placed upon the east harbor line as heretofore established by the Drainage District, and indicated on the maps of Messrs. Tuttle & Pike, engineers of said Board, and now on file with the secretary thereof, and marked by monuments upon the grounds, and the west pier, as shown upon said blueprint, which shall extend to bedrock, shall be connected with the west bank of the Kaw river by such means, by open trestle or other open work, as the Belt Company may elect, provided, however, *that if at any time hereafter it shall be finally determined that the Drainage District, acting under*

legal authority, has established, or shall have established, a legal harbor line west of said west pier, and that the lawful width of said Kaw river shall exceed the distance between said east harbor line and said west pier, and that the Drainage District has the lawful right to require the construction of bridges for the full width of said river, and to cause the channel of said river to be widened to correspond therewith, and all unlawful obstructions to be removed therefrom, then the Belt Company agrees that it will build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established.

2. The Drainage District hereby consents to the construction of said permanent bridge *as provided for in the foregoing paragraph*, and declares that the same, when constructed, shall constitute a lawful structure, at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter.

3. *If the power and authority of the Drainage District shall not be finally sustained and upheld as above provided, then this agreement shall be without prejudice to either of the parties hereto, and, in any event, this agreement, as between other persons, shall be without prejudice to the rights of the Drainage District and any person or corporation in respect to any litigation now pending* OR WHICH MAY BE HEREAFTER BROUGHT.

In witness whereof, the parties have caused these presents to be duly executed the day and year first aforesaid.

Matters Not Alleged in the Answer.

Attention of the Court is here called to the fact that the Railway Company *does not* allege in its answer that after the making of the contract above set forth it was finally determined that the Drainage District had established a legal harbor line west of said west pier and that the lawful width of the river exceeds the distance between said east harbor line and said west pier, and that the Drainage District has a lawful right to require the construction of bridges for the full width of the river and to cause the channel of said river to be widened to correspond therewith and all unlawful obstructions to be removed therefrom.

Nor is it alleged that the Belt Railway Company or its successor, the Terminal Railway Company, *has built or constructed an additional span from the west pier of its bridge to the west harbor line.*

It is to be noted that the third paragraph of the contract above set forth provides:

First, that if the authority of the Drainage District to establish the width of the channel at 734 feet and fix harbor lines for such a channel is not finally sustained, then the aforesaid contract is to be without prejudice to either of the parties hereto, to-wit, the District and the Belt Railway (not the Belt Railway and its successors), "and in any event this agreement as between other persons (that is, persons other than the Belt Railway Company and the Drainage District) shall be without prejudice to the rights of the Drainage District and any person or corporation in respect to any *litigation* now pending *or which may be hereafter brought.*"

On March 23, 1912, a stipulation was filed, providing that the case should be set down for hearing on April 5, 1912.

On April 5, 1912, the Drainage District moved for judgment upon the pleadings. The journal entry of submission

(paragraph 34, Record) shows that the cause was heard on the pleadings, and that this suit, together with No. 313, *Kansas City Southern Railway Company, Plaintiff in Error,* v. *Kaw Valley Drainage District,* involving similar questions, was submitted upon the motions for judgment on the pleadings, on briefs for both parties and after oral argument by counsel, and taken under advisement by the Court.

The judgment commanded the defendants in said suits to forthwith remove from the channel of the Kansas river *all obstructions* of every kind and character where their lines cross the stream, and command the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis Directrix.

The cases were argued and considered together in the Supreme Court of Kansas and one opinion written for both suits. The same is set forth at length, pages 22 to 31 of the Transcript of Record.

BRIEF OF ARGUMENT.

I.

This Court has no jurisdiction because there is no Federal question in this case.

1. The record does not show that any right of the company protected by the Federal Constitution was put in issue or decided. The Company claims that its answer to the alternative writ shows that a Federal question was involved in this suit. The District contends that in order for an answer to raise a Federal question, it must state facts presenting such question; that a mere conclusion of law inserted in the answer, to the effect that a certain order or demand of the District constitutes a taking of its property for public use without compensation, or without due process of law, or denies to it the equal protection of the laws, without a statement of facts so showing, is insufficient. That the alleged Federal questions appear from an examination of the pleadings to be fictitious, or to have been so plainly foreclosed as to make argument improper.

2. The decision of the Supreme Court of Kansas is in substance that the answer and return of the Railway Company set forth no defense to the alternative writ, and that the pleadings before that court invested it with jurisdiction to issue the peremptory writ set forth in the record. The question whether the Supreme Court of Kansas erred in holding that it could rightfully decide upon the pleadings, that the peremptory writ shown by the record should be allowed, is a question of pleading and practice to be conclusively determined according to the general principles of the laws of Kansas applicable thereto.

II.

The order of the Drainage District and the judgment of the Kansas Supreme Court enforcing it did not impair the obligation of the defendant's contract of 1907 with the Drainage District, nor deprive the defendant by reason of its alleged contract of its property without due process of law.

1. The Board of Directors of the Drainage District had no power to make a contract fixing the elevation of the bridge so that the same could not be subsequently changed, as shown by the pleadings in this suit.

(a) The Drainage District had no authority to make irrevocable contract as to elevation of bridge.

(b) The state had no power to make an irrevocable contract as to the elevation of a bridge over a navigable river, and therefore no power to grant such authority to its agent, the Drainage District.

(c) The District did not make a contract fixing the elevation at which the bridge should be maintained. The alleged contract amounts to a mere license to construct a bridge according to the plan annexed. It does not purport to give authority to maintain such bridge at the elevation fixed in the plan for any length of time. The contract contains no provision purporting to impose the expense of altering the bridge on the District or relieving the Company therefrom. The contract, insofar as the same purports to fix the elevation at which the bridge might be maintained, is *ultra vires* and void.

(d) The alleged contract by the provisions of Section 3 thereof cannot be used as a defense to this suit.

III.

Neither the order of the Drainage District, nor the judgment of the Supreme Court of Kansas, constitute a taking of the Company's property, or denies to it the equal protection of the law or deprives it of its property without due process of law.

1. The alleged interference with interstate commerce, the alleged refusal of Kansas City to change the grade of certain streets, the want of hearing before ordering elevation of bridge, the alleged non-consent of the War Department for leave to raise its bridge, assuming (what is not admitted) that the same were well plead, are in law insufficient defenses.

2. The answer admits all the allegations of the alternative writ, including the allegation that the district made and served upon the Railway Company "as set forth in its petition" for the writ, an order to raise the bridge 4.96 feet, and to remove the old bridge, superstructure, abutments, piers, piling and wreckage, and that the Company refuses so to do.

3. The answer contains no allegation raising an issue as to the reasonableness of the requirement of the District that the bridge be elevated, so that the lowest point of the superstructure be 342.73 feet above the St. Louis Directrix, or as to the reasonableness of the demand of the District for the clearing of the channel to the elevation of 342.73 feet.

4. The power of the directors of the Drainage District to fix and alter the elevation of the bridge and to condemn bridges or parts thereof as obstructions, is legislative in its nature and its exercise not subject to review by the courts. In any event, this is true when the question of the reasonableness of the order is not challenged in the answer by appropriate allegations of fact.

5. It is the duty of the Company to elevate its bridge and to clear the channel, as required by the Drainage District, at its own expense, and the judgment of the Supreme Court of Kansas requiring it so to do does not deprive the Company of its property without due process of law, nor constitute a taking of its property for public use, nor deny to the Company the equal protection of the laws. The loss incident to the enforcement of the police power of the state in such a case is *damnum absque injuria*, and does not constitute a taking of the Railroad's property for public use.

6. The Company went to trial on an issue of law. It has not asked leave to amend its answer. It submitted its rights for final judgment on an issue of law presented by a motion for a peremptory writ.

IV.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial to the defendant of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

1. The argument of the Company on this proposition is not supported by the record. It assumes, contrary to the record, that there were issues of fact as to the truth of material allegations of the alternative writ.

2. It is a common and permissible practice where an answer does not allege any defense, to render judgment for the plaintiff on the pleadings. The Railway Company had notice and was fully heard before the rendition of the judgment. Whether or not the answer raised an issue of fact necessary

to be supported by evidence to entitle the Drainage District to judgment, or stated any valid defense, and whether the pleadings before the court were sufficiently broad to invest that court with jurisdiction to issue the peremptory writ set forth in the record, were questions within the jurisdiction of the Supreme Court of Kansas to decide, dependent upon general principles of law, and not involving any provision of the Constitution of the United States.

3. The record shows the procedure of the Kansas Supreme Court to have been in harmony with the laws of the state and the Constitution of the United States.

V.

The judgment that the Railway Company clear the channel to the elevation required is within the scope of the relief demanded by the alternative writ of mandamus. The Supreme Court of Kansas had, by virtue of the pleadings, jurisdiction over the parties, the bridge and the river, and its judgment awarding a peremptory writ is not erroneous or void.

BRIEF AND ARGUMENT.

I.

This Court has no jurisdiction. There is no Federal question in this case.

The alleged Federal questions are fictitious.

New Orleans v. *New Orleans Water Works Co.*, 142 U. S. 79, 12 Sup. Ct. Rep. 142.

In *Mo. P. R. Co.* v. *Castle*, 32 Sup. Ct. Rep. 606, 224 U. S. 541, 56 L. Ed. 875, this Court decides:

> "A judgment of a Federal Circuit Court will be affirmed on motion, under Supreme Court Rule 6, Subd. 5, where the questions urged as a basis for reversal have been so plainly foreclosed by the decisions of the Supreme Court as to make further argument unnecessary."

See also *McGilvra* v. *Ross*, 30 Sup. Ct. Rep. 27; 215 U. S. 95.

The Kansas Supreme Court held on a motion for a peremptory writ that the answer stated no defense.

In *Iowa Cent. Ry. Co.* v. *State of Iowa*, 160 U. S. 394, 16 Sup. Ct. Rep. 344, this Court decided:

> "The question whether the highest state court erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a con-

troversy pending before it, that the averments of an answer, set forth no defense to the claim of the plaintiff, is not reviewable on appeal to the Supreme Court."

Justice White, delivering the opinion of this Court, at page 345, says:

> "It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an appellate court, of such a question as that presented by the record in the case at bar, viz.: whether or not the highest court of a state erred in holding that it could rightfully determine, from the statements in the pleadings filed by both parties to a controversy pending before it, that the averments of an answer set forth no defense to the claim of the plaintiff."

II.

The order of the Drainage District and the judgment of the Kansas Supreme Court enforcing it do not impair the obligation of the defendant's contract nor deprive the defendant of its property without due process of law.

The Railway Company in its brief suggests that the fifteenth subdivision of Sec. 3006, Genl. Sts. of 1909 of Kansas, invested the directors of the District with power to make a contract fixing the elevation of its bridge so that it could not be subsequently compelled by the directors to raise the same at its own expense.

The clause of the statute relied upon does not give power to make the provision of the contract in controversy. The corporate nature and purpose of the plaintiff District must be kept in mind. It is a corporation organized to improve and regulate water courses and chiefly to prevent overflows.

It is given as incident to its objects the power to regulate the construction of bridges. It is given express power to contract for construction of levees, for dredging, etc. The clause cited is not the only provision of the statute giving power to contract. It is a general clause enacted as a matter of precaution to supplement the express power to contract given by other sections, particularly Sections 3016 and 3026, General Statutes 1909. The power given by this clause is limited and by its terms does not extend to the matter in controversy. The language is, "to make all contracts and do all other acts in relation to the affairs of the District *necessary to the proper exercise of its corporate legislative and administrative powers, and to the accomplishment of the powers of the purpose of its organization.*" Was it necessary to the proper exercise of the corporate or legislative or administrative powers or to accomplish the purposes of the organization of the District that it make an irrevocable contract or any contract with the Company fixing the elevation for the maintenance of its bridge? The proper exercise of its corporate, legislative and administrative powers and the accomplishment of the purposes of the organization of the District imperatively required that no such contract be made. The contract in controversy it made was neither necessary or proper to carry out any corporate, legislative or administrative power or to accomplish any purpose for which the District was organized and was therefore not authorized to be made by the clause of the statute relied upon by the Company.

The Railway Company in its Brief, at page 13, says:

> "It is alleged in the answer and stands admitted upon the record that there was no change or alterations in conditions in respect to the bridge or the Kansas river or anything else intervening between the Drainage District's approval of the bridge as constructed and its determination to cause the bridge to be elevated."

This statement is misleading. There was a flood in 1908, one year after this bridge was built. The occurrence of the flood in Kansas was a matter of common knowledge. Over 20,000 people were driven from their homes and millions of dollars' worth of property was destroyed. Railroads stopped and business generally was paralyzed at Kansas City by the overflow of the Kansas river.

The record in this case shows (see bridge plan, page 10 of Transcript) the elevation or height of the high water at the bridge in controversy in 1903, 1904 and 1908. It appears from the Company's answer the lowest point of the superstructure of its bridge is at an elevation of 750.90 feet above sea level and that in 1903 the water was 10.30 feet, in 1904 .70 feet and 1908, 2.06 feet up on the bridge beams of the bridge in controversy. In other words, in 1908 the beams supporting the floor of the bridge were submerged over two feet, so that the bridge became a steel dam to that extent, 600 feet in length across the channel of the river.

This Court is not bound to ignore its judicial knowledge of the occurrence of this flood in Kansas City in 1908. It is the duty of this Court to take judicial notice of all matters that the Supreme Court of Kansas would notice. The annual report of the chief of engineers of the United States published by authority of Congress for 1908, page 1671, states:

> "Floods.—During the month of June a disastrous flood visited the Missouri river and its tributaries, great damage being done and much land overflowed, *especially in the Kaw river* and Missouri river from Atchison to the mouth.
>
> Kansas City and vicinity suffered severely. The Missouri river at the Hannibal bridge was above the danger line from June 8 to July 6, a period of four weeks. The Kaw river was above the danger line from June 9 to June 17. The damage at Kansas City is variously estimated *from two to three million dollars.* Hydrographs

for the Missouri river at Sioux City, Kansas City and St. Charles for 1907 and first half of 1908 are shown on Plate VI; *also hydrograph for the Kaw river, June 9 to June 30, 1908.*"

"The court may take notice of matters of fact or law, although contrary to what has been alleged, and may do this on the hearing of a demurrer, although the facts judicially noticed to be untrue are otherwise well pleaded." Encyl. of Evidence, Vol. 7, 883.

In *Southern Pac. R. Co.* v. *Groeck*, the first paragraph of the syllabus is as follows:

"The rule that, for the purpose of disposing of a demurrer, such facts as are well pleaded are taken to be true, does not apply where, by a public record, of which the court takes judicial notice, the facts are shown to be otherwise."

In the opinion the court says:

"Although the bill alleges that the order of withdrawal of the odd sections within thirty miles of the route of the complainant's road, as delineated on the map filed by it January 3, 1867, made by Secretary Browning, March 19, 1867, has ever since remained in force, and although, for the purpose of disposing of a demurrer, the rule is all such facts as are well pleaded are to be taken as true; yet where, by a public record, of which the court takes judicial notice the fact is shown to be otherwise, the general rule should not, I think, be held to apply. The acts of the Secretary of the Interior done in the performance of his official duty are matters of which the courts may take judicial notice. *Caha* v. *U. S.*, 152 U. S. 211, 221, 222, 14 Sup. Ct. 513." 68 Fed. 609, p. 612.

The common law and statutes of Kansas require a railway company, where it constructs a bridge over a navigable stream,

to restore it as far as possible to its natural state and not to impair its usefulness. (Subdivision Four, Sec. 1763, Gen. St. 1909 of Kan.; *Union Trust Co.* v. *Cuppy*, 26 Kan. 754; *Riddle* v. *Rly. Co.*, 88 Kan. 248; *Emporia* v. *Rly. Co.*, 88 Kan. 611.)

The statute above cited provides:

> "Fourth. To construct its road across, along or upon any stream of water, watercourse, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city."

This special statute applied to Railway Company. It was not repealed by the Drainage Act. It deals with the duties of railways in the particular matter under consideration. They must take the burden as well as the benefit of this statute while they operate under it.

There is, in fact, no contract that aids the defendant Company. The District merely granted a license or permit to build a bridge according to a certain plan. It did not pretend to bind itself not to ask for a modification of that plan. Nor is there anything in the contract releasing the Railway Company from liability for expense of altering the elevation of the bridge.

The idea now advanced by counsel does not appear from the contracts or plans to have been thought of or mentioned. The third paragraph of the contract shows the district was not to be prejudiced by the contract or affected by the contract

in litigation hereafter commenced as against the successors of the Belt Railway Company and any other person.

The Company does not allege that the river has been widened to 734 feet, nor that the harbor lines have been established nor that it has done what it agreed to do if the river was widened to 734 feet, to-wit, build a 134-foot span from the west pier to the west harbor line.

The Supreme Court of Kansas in its opinion (see pages 26 and 27, paragraphs 55-57, Transcript) says:

> "As the plaintiff is a public corporation manifestly created for the purpose of preserving and protecting life and property from the ravages of floods, it must be presumed that its officers are acting in good faith, and with sufficient cause and reason and that *prima facie*, at least, their conclusions as to present requirements is correct. One of the powers of the Board repeatedly expressed in the Act (Sec. 3006 & Sec. 3009, Gen. Stat. 1909) is to do such things as shall be 'conducive to the public health, convenience or welfare,' and it is known that the statute was enacted by reason of flood disasters in 1903 and 1904 with a view to avert their repetition if possible. Among the powers vested in the Board are (Sec. 3006):
>
> 'To prescribe, regulate and fix the height of the superstructures above the water, * * * to fix, regulate and change the grade or elevation of all public highways, railroads and street railroads at points where any levee may cross or intersect the same. * * * To require all railroad companies to elevate their tracks at all points where the same shall be intersected by any levee so that such tracks will not interfere with the construction or maintenance of such levee as a continuous and effective work of uniform height to prevent the overflow of any natural watercourse. * * * To do all other acts that may be necessary to carry out and execute the general powers hereinbefore or hereinafter granted, although not hereinbefore specially enumerated.'

Being created for the purpose indicated it cannot be held that one set of officers can bind themselves or their successors by an agreement like the one in question, for if such could be the case requirements for future conditions would be rendered futile, and conditions agreed upon by one board would have to remain in spite of the desires and conditions possessed and found by a subsequent board. Any person or corporation contracting with the board must be held to do so subject to such changes in the matters contracted about as subsequent exigencies may require. In its work of clearing the channel of the river and fixing the height of superstructures the board is clearly exercising police power, and it is settled that in such cases a contract by which police power is attempted to be abrogated is *ultra vires* and void. (*State* v. *St. Paul, M. & M. Co.*, 108 N. W. 261.)

'The right to exercise the police power is a continuing one that cannot be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise as it is immaterial upon what consideration the attempted contract is based.' (*Northern Pacific Railway* v. *Duluth*, 208 U. S. 583.)

In that case it was said in the opinion, p. 596:

'There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts.' On the same page is found a quotation from the decision in *New York & New England Railroad Company* v. *Bristol*, 151 U. S. 556:

'It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in

securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury.'

It is argued that because the fourth subdivision of this section authorizes the board 'to condemn and cause obstructions in such watercourses to be removed,' it cannot obtain the relief now prayed for without condemnation and compensation. But the evident meaning of 'condemn' as here used is to declare or pronounce a thing to be wrongful, and not to proceed as under the rule of eminent domain to have it appraised:

'Condemn: To pronounce to be wrong; to disapprove of; to censure.' (Webster's New Int. Dic. 1911.)

The succeeding clause expressly empowers the board to acquire by 'gift, purchase or condemnation' such lands as may be necessary, and it would indeed be an anomoly to speak of condemning an obstruction for the purpose of acquiring title to it."

The opinion of the Kansas Supreme Court follows the law as stated by this Court.

In the case of the *State* v. *St. P. M. & N. W. Ry. Co.*, 98 Minn. 380, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047, affirmed in the United States Supreme Court, 29 Sup. Ct. Rep. 698, on the authority of *Northern P. R. Co.* v. *Minn.*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341, is a leading and instructive case.

The Supreme Court of Minnesota in that case decided:

"The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad the uncompensated duty of constructing and main-

taining at such crossings all safety devices as are reasonably necessary for the protection of the traveling public.

A bridge over the railroad tracks, when necessary to make the crossing safe for public use, is a 'safety device' within the meaning of that expression.

A contract by a city, by which the police power is attempted to be forever abdicated, is *ultra vires* and void."

The court in its opinion, at page 264, says:

"The Supreme Court of the United States in 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, in reviewing the case of *C. B. & Q. Ry. Co.* v. *Chicago*, 149 Ill. 457, 37 N. E. 78, after quoting the above excerpt from the prior Illinois decision, said: 'We concur in these views. The expense that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchise granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state."

In *C. B. & Q. R. Co.* v. *People of Illinois*, 72 N. E. 219, affirmed 200 U. S. 561, 26 Sup. Ct. 341, 4 A. & E. Ann. Cases 1175, the court decides:

"2. It being the common-law duty of a railroad company to make such necessary changes in its bridge across a natural watercourse as will accommodate the waters which drain through the same though the flow be increased by artificial improvements, requiring it to do so under the provisions of the Farm Drainage Act (Hurd's Rev. St. 1901, p. 687) does not invade any constitutional provision against the taking of property without due process of law or without just compensation."

On the second appeal to the Supreme Court of Minnesota in the case above cited, 101 Minn. 545, 112 N. W. 1142, the court said:

> "This cause was before us on a former appeal, and is reported in 98 Minn. 380, 108 N. W. 261. That appeal was by the relator, and from a judgment dismissing the proceedings. The judgment was reversed, and a new trial ordered. A second trial resulted in judgment for relator, from which defendants appealed. The facts disclosed by the present record are in all substantial respects identical with those presented by the former record, and the questions raised and discussed in the briefs are the same. Defendants urged on that appeal, as they do at this time, that to charge them with the uncompensated duty of constructing and maintaining the bridge in question would violate their constitutional right, existing both under the state and the Federal Constitutions, in that it would deny them the equal protection of the law and operate to take from them their private property for a public use without compensation. *Counsel call attention to Section 2642, Gen. St. 1894, not cited on the former appeal, which provides, in substance, that the municipal authorities and railroad company may, in cases of this kind, 'agree upon the manner and upon the terms and conditions' under which the street or highway may be used or occupied by the railroad company. This statute does not change the situation or legal rights of the parties in the least. A similar statute of the state of Ohio was construed by the Supreme Court of the United States in Ry. Co.* v. *Defiance*, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87, *and doubt was expressed whether it applied to street crossings, but only to cases where the railroad 'runs along and upon the street.' But, conceding that it did apply to the facts there involved, a street crossing case, the court went on and held that any previous arrangement made between the railroad company and the city was not irrevocable, and that the city could, in the exercise of its legislative power, vested and granted by*

the statutes of that state, which conferred upon its council, as in the case at bar, supervision and control of the streets and highways within its limits, abandon and repudiate the same, and require the railroad company to conform to such new regulations as public interests demanded."

A Controlling Case.

In *C. B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 18 Sup. Ct. Rep. 513, the court decided:

"3. When corporations created for a public purpose, such as railroad companies, enter into contracts affecting the safety and welfare of the public, the presumption is that they do so with the knowledge that their agreements cannot withdraw such subjects from the police power of the state; and hence such contracts are not necessarily protected by the Federal Constitution from subsequent state legislation modifying or annulling their provisions.

4. A contract between a city and a railroad company for sharing the expense of maintaining and repairing a viaduct, carrying a street over the railroad tracks, is one affecting the safety of the community; and the subject-matter is in the police power of the state, so that it may, by a subsequent statute, impose greater burdens upon the company without violating the contract clause of the Federal Constitution."

In the opinion it is said:

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms, without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with

matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state. It is argued that, while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction, unless adopted under the compulsion of state necessity; that, while it is not questioned that the maintenance of the viaduct is essential to the safety of the community, yet, if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the Federal Constitution.

Before considering this proposition, it is proper to observe that it proceeds upon the assumption that, by

the agreement between the parties in the present case, the duty of repairing and maintaining the viaduct was put upon the city. *But an examination of the terms of the contracts fails to show that this assumption is well founded.* Certainly, there is therein no express provision or stipulation that, after the viaduct had been constructed, its future repair and maintenance should be at the cost of the city. It is, however, contended that as the viaduct when constructed became a part of Eleventh street, and as the law implies a duty on the city to keep its streets in a safe condition, such a duty entered into this contract as a part thereof, and therefore the city, by the execution of the contract, became bound to keep the viaduct in repair. On the other side, however, it was equally made the duty of the railroad company by the statute of Nebraska, under which this agreement was made, 'to maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercouse, or other way.'

However this may be, we think that, in view of the paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reason-

ableness of the amount apportioned to them respectively for the repair of the viaduct in question.

The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the state, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances."

In *Lake Erie & W. R. Co.* v. *Shelley*, 71 N. E., the Supreme Court of Indiana held, under a statute providing that railroad companies constructing their tracks across a highway shall restore the highway to its former state in a manner not to unnecessarily impair its usefulness:

"A railroad company cannot, on the establishment of a highway across its tracks, recover as compensation the expense it must incur in constructing and maintaining the necessary crossings and approaches."

Statutes granting governmental powers to be construed in favor of the public.

In *Anderson* v. *Wellington*, 40 Kan. 176, 19 Pac. 719, the court said:

"The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation—not simply convenient, but indispensable. (Dillon Mun. Corp., 3d Ed., p. 115, and authorities cited.) *Any fair and reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the*

power is denied. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter.

In the case of *City of Leavenworth* v. *Norton*, 1 Kan. 405, Dass. Ed., the Supreme Court of Kansas held:

> "All powers not expressly granted by the charter of a municipal corporation, or necessary to carry out these powers, held to be denied. It can take nothing by implication. (*Leavenworth* v. *Rankin*, 2 Kan. 357; *Burns* v. *Atchison*, Id. 455.
>
> The City of Leavenworth is a municipal corporation created by act of the legislature, and its powers are strictly limited and controlled by the provisions of the charter."

To like effect is the principle in the following cases:

Wyandotte v. *Corrigan*, 35 Kan. 24.
City of Leavenworth v. *Rankin*, 2 Kan. 357.
City of Leavenworth v. *Laing*, 6 Kan. 287.

The state of Kansas cannot make an irrepealable contract fixing the elevation of a bridge—neither can it authorize a municipality to make such a contract.

While we are very clear that no contract was attempted to be authorized by the legislature of Kansas permitting the Drainage District to make a contract fixing the elevation of the bridge in controversy so that the District could not require the same to be raised by the Company at its own expense, yet if it should appear to the court that such an authority was attempted we desire to present our views as to the limitation upon legislative power found in the Constitution of Kansas.

Section 1 of Article XII of the constitution of Kansas provides:

> "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

Under this provision of the Constitution, the state has reserved to the legislature the power to alter, amend, or repeal any charter granting to cities the power to contract, supervise or control public utilities.

The District and all persons dealing with them must take notice of this constitutional provision and of the power reserved in the legislature to make changes in charter provisions, which changes may affect the rights of individuals and of corporations dealing with those cities.

The power reserved in the state, under provisions similar to the constitutional provision above quoted, has frequently been before this Court for review.

In support of this point see also *Stanslaus County* v. *San Joaquin & Ks. R. C. & I. Co.*, 192 U. S. 211; *Tomlinson* v. *Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Shields* v. *Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 27 L. Ed. 408, 2 Sup. Ct. Rep. 267.

The demand of the Drainage District that the defendant raise its bridge 4.73 feet is not unreasonable on its face.

In *St. Louis Gunning Advertisement Company* v. *St. Louis*, 137 S. W. 929, the fourth paragraph of the syllabus is as follows:

> "In determining the reasonableness or unreasonableness of ordinances regulating buildings in a city, all ordinances must be held valid save where unreasonableness appears on the face of the ordinance or where the ordinance is clearly shown to be unreasonable."

In the opinion in the case, at page 692, the court points out that some ordinances may be reasonable or unreasonable, valid or invalid, depending upon the particular facts presented by the case before the court; and, quoting from 100 S. W. 627, says:

> "Unless the unreasonableness of the ordinance is apparent upon the face thereof, the burden is upon the person asserting it to be unreasonable to so show by the facts."

The test of the validity of a law which creates a liability like that of the order of the Drainage District in controversy is not whether it does objectionable things, but whether there is any reasonable ground to believe that the public safety or general welfare is promoted thereby. (*State* v. *Clawson*, 117 Pac. 1101.)

Does the order of the Drainage District requiring the defendant to raise its bridge have some relation to the public safety? Is it in fact the end sought to be attained? Does it appear generally to tend to protect the public from some manifest evil? The rule is that an ordinance enacted under the police power is not invalid as unreasonable unless it is clearly so, and every intendment will be indulged in favor of its validity. (*Harter* v. *Barkley*, 112 Pac. 556.)

In the case of *In re Wilshire*, 103 Fed. 620, it is decided, laws enacted in the exercise of the police power, whether by a municipal corporation acting in pursuance of the laws of a state, or by a state itself, must be reasonable and are always

subject to the provisions of both the Federal and state constitutions and to judicial scrutiny; but the courts will not declare such laws unconstitutional except in clear cases.

In *Miller* v. *City of Birmingham*, 44 So. 380, the second paragraph of the syllabus is as follows:

> "The reasonableness of a municipal ordinance which relates to a subject within the corporate jurisdiction, will be presumed unless the contrary appears on the fact of the ordinance itself or is established by proper evidence."

In *Greencastle* v. *Thompson*, 81 N. E. 497, it is decided:

> "Where the adoption of a municipal ordinance is expressly authorized by the legislature and the power so granted is not in conflict with a constitutional prohibition, it cannot be successfully assailed as unreasonable."

III.

Neither the order of the Drainage District nor the judgment of the Supreme Court of Kansas constitute a taking of the Company's property, or denies to it the equal protection of the law, or deprives it of its property without due process of law.

Neither the order or judgment constitutes any wrongful interference with interstate commerce or any business of the Company.

The order of the District requiring the Railway Company to raise its bridge is not a regulation of commerce nor a wrongful interference therewith. The Railway Company admits in its answer that it can raise its bridge and operate its trains thereover if the approaches leading

thereto are also raised several feet. Its real contention is that it has no authority to raise the approaches to its bridge because of an alleged refusal of the city of Kansas City to make such changes in grades of streets as will be necessary when its bridge is elevated, as required by the order of the District.

The allegation that the city "has not raised the grades of any of its streets upon which the approaches rest, and has refused to make such changes in the grades of such streets as will necessarily be required in the operation of trains by the defendant if the elevation of its bridge is increased in accord with the demand of the plaintiff," is an admission that if the approaches are raised, the use of the bridge may be continued as heretofore. This objection on the part of the Company is an argumentative, conditional, contingent or conjectural conclusion on the part of the Company, and insufficient to excuse the Company from raising its bridge or clearing the channel.

The fact that the Railway Company is engaged in interstate commerce does not prevent the state acting, through its duly authorized agent, from enforcing its police powers for the protection of life and property, by requiring the bridge to be raised or wholly removed from the river. The state has a right to interfere with the maintenance of a dangerous bridge across a public highway, so far as is necessary for the public protection.

The allegations as to the refusal of the city to change the grades of the street are not a valid defense.

The Railway Company has not alleged any demand *by it* upon the city of Kansas City to either enact an ordinance for the change of the grade of the streets referred to in its answer, or for permission to elevate its tracks by the construction of an embankment, trestle or viaduct along or over said streets.

The allegation, that the city "has not raised the grades of any of its said streets upon which said approaches rest and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant *if* the height or elevation of its said railway bridge is increased in accord with the demand of the plaintiff herein; and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said street," does not amount to an allegation *that the Railway Company has demanded* and been refused permission to reconstruct the approaches to its bridge.

> "The respondent in his return or answer must state the facts relied upon by him with certainty. Nothing is to be left to inference." 13 Enc. of P. & P. 716.

In High's Extraordinary Legal Remedies, Sec. 472, it is said:

> "No principle of the law of mandamus is better settled than that an argumentative return be like any other argumentative pleading is bad. The facts relied upon should be set forth clearly and positively *and not by way of argument or inference.* In other words, facts should be stated and not mere conclusions or inferences from facts, since a defective or incomplete statement of facts will not be aided or supplied either by intendment or inference. *Nor will the necessary facts which are not stated be inferred or intended from the facts actually set forth.* And a return is faulty which states mere conclusions of law without stating the facts so that the court may judge of their sufficiency."

The Railway Company does not appear from the record to have any franchise or rights to use any of the public streets of Kansas City.

The laws of Kansas require a railway company to procure the consent of the city to the construction or maintenance of railway tracks on public streets. The defendant company does not allege that it has any franchise or license at this time to occupy any public street of the city of Kansas City, Kansas. The record does not show, but it may be true, that the franchise or license of the company to occupy the public streets of Kansas City, Kansas, has expired.

The harbor line map (of which the District claims this Court may take judicial notice) shows that it is several hundred feet from the river to the nearest street from the bridge in controversy. Before the plaintiff can complain with reference to inaction on the part of either the District or the city with reference to the changing of grade it ought to allege *that it has some rights with reference to the occupation or use of the public streets for its railway tracks*, and in the absence of such allegation, this Court does not warrant it in assuming that the Railway Company has any right to use or occupy any public street of the city of Kansas City, Kansas, particularly in view of the fact that the defendant company in its answer alleges that the "streets are not under the control of this defendant, but under the exclusive control of the city of Kansas City, Kansas." *The answer is in its effect an admission that the defendant has no rights on the public streets of Kansas City.*

In this connection, the Court's attention is called to the seventh subdivision of Section 3006, Gen. Stats. 1909, which authorizes the Drainage District to change the grade or elevation of all public highways or railroads at points where its levees cross or intersect the same.

This Court will take judicial notice that under the provision of Chapter 172 of the Laws of Kansas, 1911, and the proclamation of the governor of Kansas, of date February 3, 1911, the state appropriated to the use of the Drainage District all the land between the harbor lines and a strip of land 40 feet wide landward therefrom, said 40-foot strip being appropriated as set forth in said proclamation for the construction and maintenance of levees.

The Railway Company does not allege willingness to raise its bridge.

The alleged refusal of the city to change the grades of the streets upon which the Company's approaches to its bridge are constructed, does not appear from the answer to have been given in reply to any demand from the Railway Company, and even if the Railway Company had made such a demand upon the city and the same had been refused, it would be wholly immaterial, *unless the Company alleged its willingness to elevate its bridge.* As a foundation for a defense alleged, it would be necessary for the Company to allege its willingness to raise the bridge as required by the order of the District.

The defense that the city will not consent to a change of the grades of the streets is inconsistent with the position assumed by the Railway Company in its answer. As the Supreme Court of Kansas properly observed, if the Company was seeking to raise its bridge, it would doubtless without difficulty obtain consent to make any necessary or proper alterations in its approaches from the city or the Drainage District, or both.

In conclusion on this point, it cannot be inferred from the answer that the Railway Company is willing to raise its approaches or has requested permission from either the Drainage District or the city so to do, and it must be assumed that the

officers of the Drainage District and the city, will or have consented to such alterations in the approaches of the Company to its bridge, as are necessary to enable it to continue the use thereof, especially if it has any rights on the streets.

The allegation that the District (paragraph 36 of answer) has no power or authority to order the raising of the bridge or the clearing of the channel is not a statement of any facts constituting a defense, but is a conclusion of law and an erroneous one as well.

As is said by the Supreme Court of California in *Ohm* v. *San Francisco*, 92 Cal. 437, 28 Pac. 580:

> "A conclusion of law in a pleading, so far as it is correct, is useless, and when erroneous it is worse than useless, and in either case it will be treated as if not alleged, in considering objections to the pleadings raised by demurrer."

The statutes of Kansas invest the District with plenary power to represent the state of Kansas as to the river and defendant's bridge.

The 4th, 5th and 9th sub-divisions of Sec. 3006, Gen. Stat. 1909 of Kansas are as follows:

> "*Fourth.* To take charge of and exercise exclusive control over all natural water courses within its territorial limits and to so widen, deepen, establish, regulate and maintain the channels thereof, and to construct and maintain such levees along the banks thereof as may be deemed necessary or proper to prevent or restrain overflow or lessen the volume thereof or the injury deemed likely to result therefrom; * * * *and may condemn and cause obstructions in such water courses to be removed.* * * *
>
> *Fifth.* To prescribe, regulate and fix the height of the superstructures above the water, the length of all

spans and the location of the piers of all bridges across water courses situated in the district.

Ninth. To maintain in any court of competent jurisdiction suits to enforce the reasonable orders of its directors to enjoin the placing *or maintenance* in any natural water course of any *unauthorized bridge,* embankment, pier or other work or structure constituting to any extent whatever an obstruction to the flow of the water. To restrain all other wrongful or unauthorized encroachments upon or interference with the channel of such water course, and to have all obstructions wrongfully placed in the channel of natural water courses adjudged public nuisances and abated as such. * * *"

The non-approval by the War Department of plans for the raising of its bridge is not a defense to this suit.

The Railway Company does not allege that it has submitted to the Chief of Engineers or Secretary of War of the United States any plan or request for permission to elevate or raise its bridge *in accordance with the notice of the Drainage District involved in this suit.* Sec. 9 of the Act of Congress of March 3, 1899, 30 Stat. at Large, p. 1151, 6 Fed. Stat. Annot. 805, is as follows:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided,* that such structures may be built under the authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans

thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced; *And provided further, that when plans for any bridge or other structure have been approved* by the Chief of Engineers and of the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

Before the Company can rely on this statute, it must bring itself within its terms and must allege that it has asked the consent of the Chief of Engineers and Secretary of War to make the change in its bridge required by the Drainage District. The purpose of the statute above quoted is to prevent obstructions to the free navigation of water ways. The judgment of the Supreme Court of Kansas is for the removal of all obstructions to an elevation of 342.73 feet. This judgment promotes the objects of the statute and is in entire harmony with it. There is nothing in this Federal statute which makes it unlawful for the Railway Company to perform the judgment of the Supreme Court of Kansas in this case.

The Supreme Court of Kansas in its decision held:

> "The plaintiff board cannot compel the elevation of bridges in question until reasonable plans therefor are approved by the proper federal authorities."

This paragraph of the court's decision is not to be construed as constituting a defense to the right of the District to compel the elevation of the Railway Company's bridge. It simply recognizes the concurrent jurisdiction of the United

States and the state of Kansas over the river. When a writ is issued upon the judgment, proper provision can be made therein exempting the Railway Company from performance thereof, if the Railway Company cannot secure the consent of the War Department to the elevation of its bridge 342.73 feet. A similar question arose in case of *People* v. *Board of Sup'rs*, 142 N. Y. 217, 36 N. E. 1062, an action of mandamus to compel the rebuilding of a bridge over a navigable stream; that court decided:

> "It is no reason for refusing mandamus to the board to build a bridge that before construction can be begun, the location and plans therefor would be approved by the Secretary of War."

In that case it was said the objection that under Sec. 7 of Chapter 1907, the Act of Congress passed Sept. 19, 1890, the Board of Sup'rs cannot proceed to construction of the bridge until the location and plans shall have been approved by the Secretary of War, may excuse them in a proceeding for contempt, *in case it appears that such consent has been sought in good faith and cannot be procured. We think the existence of this statute does not justify inaction and the matter can be provided for in the peremptory writ.*

The allegation that the order or demand of the District for the elevation of the bridge to 342.73 feet and the clearing of the channel is "unreasonable, illegal and arbitrary" does not put in issue the reasonableness of the order.

The pleadings presented no issue as to the necessity for or the reasonableness of the District's demand that the bridge be raised and the old bridge, its superstructure, piers, piling and wreckage removed from the channel.

The law of Kansas required the Railway Company to state the facts constituting its defense. If the Company desire to raise an issue of fact as to whether the elevation of its bridge six and one-half feet was necessary to protect the Drainage District against overflows, it should have alleged that a channel of less capacity that required, stating the facts of its contention. The conclusion of the Company that the District's demand is "unreasonable, illegal and arbitrary and beyond the power of said plaintiff to make," must be assumed to be because of the things theretofore alleged in its answer. The words "unreasonable," "illegal" and "arbitrary" as used in the answer do not constitute a statement of any fact or new matter of defense. They merely state a conclusion or opinion of the pleader. They do not amount to an allegation of mistake, fraud or misconduct on the part of the District's Board of Directors.

Justice Valentine, delivering the opinion of the Supreme Court of Kansas in *Stratton* v. *McCandless*, 37 Kan. 296, p. 305, said:

> "General allegations, such as are generally denominated conclusions of fact, conclusions of law or inferences, should not be considered as of any value, except in connection with the detailed statement of the facts."

This Court has held that facts in conclusion must be stated in an answer. In *Benbow* v. *Iowa City*, 7 Wall. 313, p. 314, 19 L. Ed. 79, the Court held:

> "A return to a mandamus ordering a municipal corporation forthwith to levy a specific tax upon the taxable

property of a city for the year 1865 sufficient to pay a judgment specified, collect the tax and pay the same, or show cause to the contrary by the next term of the court, is not answered by a return with the defense, 'did, in obedience to the order of the court, proceed to levy a tax of one per cent upon the taxable property of the said city, for the purpose of paying the judgment named in the information, *and other claims*, and that the said tax is sufficient in amount to pay the said judgment and other claims for the payment of which it was levied.' The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous in returning that the tax was levied to pay this judgment 'and other claims.'"

In Merrill on Mandamus, Sec. 280, p. 345, it is said:

"Though the mandatory part of the writ may be very general, yet the return must be very minute in showing why the respondent has not obeyed the order, and it should contain positive allegations of fact and not mere inferences from facts."

At Section 274, Merrill on Mandamus, it is stated:

"The respondent is called upon to answer to the writ, and he must confine his traverses to the statements therein contained. *He cannot answer the writ by his legal inferences from facts not stated. The court has a right to know what the facts are, that it may judge whether the legal inferences are well drawn.*"

If the Company had alleged the capacity of the channel at its bridge as now constructed and facts showing such channel to be adequate to prevent overflows, the question would

then arise as to whether or not evidence in support of such allegations (in view of the District's express legislative power to determine the elevation of bridges) was admissible. As the answer stands no such question is presented. The Supreme Court of Kansas was right in assuming that there was no issue of fact as to the reasonableness of the demand of the District for the elevation of the bridge.

DECISIONS APPPLICABLE TO THIS CASE.

Neither the order of the District nor the judgment of the Supreme Court of Kansas deprives the Company of its property without due process of law, nor deny to it the equal protection of the laws, nor constitute a taking of its property for public use.

Railway companies are required by the statute and common law of Kansas as well to construct and maintain bridges so as not to impair the usefulness of navigable rivers.

Sec. 1763, Gen. Stat. 1909, relating to railroads in the state of Kansas, provides:

> "To construct its road *across*, along or upon *any stream of water, watercourse*, street, highway, plank road, or turnpike, which the route of its road shall intersect or touch; *but the company shall restore the stream, watercourse, street, highway, plank road or turnpike thus intersected or touched, to its former state, or to such state as to have not necessarily impaired its usefulness.* Nothing herein contained shall be construed to authorize the construction of any railway, not already located in, *upon or across any street in any city incorporate, or town, without the assent of the corporate authorities of such city.*"

In *Union Trust Co.* v. *Cuppy*, 26 Kan. 754, the Supreme Court of Kansas, construing the statute relating to the construction of railroads over streets and watercourses, held:

"That a railroad company in constructing its road over a natural watercourse is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times), which may reasonably be expected to flow through such watercourse."

The Supreme Court of Kansas has followed the decisions of this Court. In its opinion (87 Kan. 272) (pages 17 to 25 of Record) it says:

"There remain questions concerning the power or propriety of granting the writs prayed for in view of the conditions set forth by the defendant as to the raising of grade to provide proper approaches for the bridges when so raised. We are met squarely by the question whether we can or should compel the defendants to put their bridges up to an altitude, which, without the raising of approaches, would render them absolutely useless and destroy the business and interstate possibilities of the defendant companies and whether they should be required to do this upon the theory that it rests upon them to find some way to compel or induce the city and the owners of intersecting railway tracks to permit such raising of the bridges and take care of the consequent alleged damages to abutting property.

It is insisted that the only proper method of requirement, if any, would be a proceeding in equity to which the city and others interested should be made parties, and that mandamus is not available, and *State* v. *Missouri Pacific Railway Company*, 33 Kan. 176, *Burlington, etc., Railroad Company* v. *People*, 77 Pac. 1026, are cited to sustain this contention. The first decision was upon the grounds, mainly, that the ordinance requiring the viaduct was vague and indefinite and that its enforcement would contravene certain provisions of the statute. In the Burlington case the ordinance was specific but it was deemed that a bill in equity rather than an action in mandamus was proper, for the reason that the viaducts

sought to be required were such that no one of the companies involved could, independently of the others, build the portion required of it. It was a case in which it was attempted to require various defendants by one order to do what would amount to works of duplication, and one in which co-operation could not be compelled. Here the two defendants only are proceeded against, each separately, and as between the plaintiff and either of them there is no physical obstacle to performing the thing required. That its performance may entail loss or expense on the defendants is a misfortune which, under the authorities, is no sufficient reason for refusing the writs. In cases where public disaster is sought to be averted the exercise of the police power is often burdensome indeed to the parties moved against, and a case might be imagined in which the actual destruction of valuable property would be required. As said in *Balch* v. *Glenn*, 85 Kan. 735 (p. 740):

'Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the legislature will secure and maintain the general welfare and prosperity of the state.'

Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefits to the public that in the opinion of the legislature he is regarded as fully compensated by his individual share in the benefits accruing to the public' (p. 743). But in this case the parties are corporations formed for a *quasi* public purpose and when granted rights to build their tracks across streams they take such rights subject to the liability to make such changes as the public welfare may require, especially so in cases where the occurrence or spread of great public disaster is sought to be averted.

All property, whether owned by private persons or by corporations, is held subject to the power of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people. The requirements that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.

'The expenses that will be incurred by the Railroad Company in erecting gates, planking the crossing and maintaining flagmen * * * necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state, and must be borne by the Company.' (*Chicago, Burlington, etc., Railroad* v. *Chicago*, 166 U. S. 226.)

Uncompensated obedience to a regulation enacted for public safety under the police power of the state is not taking property without due compensation. * * *

'It is the duty of the Railway Company, at its own expense, to remove the present bridge, and also (unless it abandons or surrenders its right to cross the creek at or in that vicinity) to erect at its own expense and maintain a new bridge in conformity with the regulations established by the Drainage Commissioners under the authority of the state; and such a requirement, if enforced, will not amount to a taking of private property for public use within the meaning of the constitution, nor to a denial of the equal protection of the laws.' (*C. B. & Q. Railway* v. *Drainage Comm'rs*, 200 U. S. 561.)

In the case just cited the court quoted with approval an expression of the Supreme Court of Illinois that the implied authority of the Company to build its present bridge was coupled with the common law duty 'to build its bridge over the natural watercourse, with a view of the future as well as the present contingencies and requirements of such watercourse, and with the further

implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use' (p. 587).

In *Northern Pacific Railway* v. *Duluth*, 208 U. S. 583, it was held that an ordinance of a municipality compelling a railroad company to repair a viaduct constructed after the opening of the road, by the city in pursuance of a contract relieving the railroad from making any repairs thereon for a term of years, was not void under the contract or due process clause of the constitution, and that such repairs could be required by mandamus. The court said (p. 595):

'We cannot resist the conclusion that, so far as concerns the matter now under consideration, the charter of the relator was taken subject to the right of the state to impose this duty whenever, by reason of the establishing of new highways, it should become necessary; and hence the relator is not entitled to compensation for obedience to this requirement.'

'But the exercise of the police power cannot be limited by contract for reasons of public policy, nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abrogate this power so necessary to the public safety' (p. 589). The Eighth Circuit Court of Appeals in *Chicago B. & Q. R. Co.* v. *Board of Sup'rs*, 182 F. 291, held that:

'A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established.'

Without multiplying citations it suffices to say that the mere matter of expense is no defense. As to the suggestion that the issuance of the writs would force the defendants into controversies with the city and with other railroad companies, it may be observed *that were the defendants seeking the privilege of raising their bridges they would doubtless find a way to secure the*

assent of the other interested parties, and it must be left to them to take care of whatever contingencies may arise by obedience to the requirements of the writs. Such other interested parties cannot well put themselves in the attitude of the unreasonable hostility to the orders of this court or to the welfare of the people comprising the Drainage District, and it cannot be presumed they will do so.

While plaintiffs pray for orders directing the defendants to raise their bridges to the points designated in the alternative writs and remove the old bridge, superstructure, abutments, piers, piling and wreckage, the real object is to clear the channel up to the height mentioned from obstructions—the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants, rather than the plaintiff, are vitally interested.

While it is to be presumed that the bridges will, in fact, be elevated or rebuilt, *it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas river all obstructions of every kind where their lines cross such stream*, the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis Directrix, and the Kansas City Southern Railway Company to clear such channel to a height of 340.26 above the St. Louis Directrix."

In the recent case of Wyandotte Co. Gas. Co. v. State, No. 472, decided by this Court January 5th last, Mr. Chief Justice White, delivering the opinion of this Court, said:

"At the outset it is certain that the determination of the question of power involves a consideration and construction of the law of the state from which the city derived its authority. While, indeed, the fact does not relieve us from the duty of determining for ourselves

the scope and character of the asserted contract, it is yet elementary doctrine that in the discharge of such duty it is incumbent upon us not to lightly disregard the construction put by the court below upon the statutes of the state, but to seek to uphold such construction so far as it can be done consistently with the obligation to independently determine whether a contract exists which in disregard of the constitution has been impaired by subsequent legislation."

In *C. B. & Q. Rly. Co.* v. *Illinois*, 200 U. S. 561, 4 A. & E. Ann. 1175, 26 Sup. Ct. Rep. 341, 50 L. Ed. 596, it was decided:

"The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety.

The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, *does not amount to a taking* of private property for public use, which requires compensation in order to afford the due process of law guaranteed by the Federal Constitution.

The equal protection of the laws guaranteed by the Federal Constitution is not denied to a railway company by requiring it to stand the entire expense of removing and rebuilding its bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois Farm Drainage Act of July 1, 1885, to effect the drainage of low lands."

The court in its opinion said:

"The relief asked was a writ of mandamus commanding the railway company to forthwith enlarge, deepen, and widen the waterway over and across the company's right-of-way across Rob Roy creek.

The contention of the railway company is that, as its present bridge was lawfully constructed, under its general corporate power to build, construct, operate and maintain a railroad in the county and township aforesaid, and as the depth and width of the channel under it were sufficient, at the time, to carry off the water of the creek as it then flowed, and now flows—the foundation of the bridge cannot be removed and its use of the bridge disturbed unless compensation be first made or secured to it in such amount as will be sufficient to meet the expense of removing the timbers and stones from the creek and of constructing a new bridge of such length and with such opening under it as the plan of the commissioners requires. The company insists that to require it to meet these expenses out of its own funds will be, within the meaning of the Constitution, a *taking* of its property for public use without compensation, and, therefore, without due process of law, as well as a denial to it of the equal protection of the laws.

Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. *If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not attach under the Constitution. Such is the present case.* There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered com-

munity, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, *although they may interfere with the full enjoyment of private property, and though no compensation is given.*' Sedgw. Stat. & Const. Law 434.

Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

In *C. B. & Q. Rld. Co.* v. *Board of Sup'rs*, 182 Fed. 291, 104 C. C. A. 573, 31 L. R. A. 1118, the Circuit Court of Appeals for the Eighth Circuit decided:

"A railroad corporation takes its franchise authorizing it to construct and maintain its road subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains thereafter established."

At pages 294-295 of the opinion, the court says:

"The duty of the railroad to conform its roadbed to the requirement of such public easements as highways and ditches is an incident of its right to construct and maintain its road. The whole subject has been clearly defined in the long line of cases in which railroads have been charged with the expense not only of building fences

along their right-of-way, and cattle guards, but also with the expense of constructing crossings over new highways, both public and private, and also with the expense of constructing bridges and viaducts so as to obviate crossings at grade whenever the public welfare required such a change. It has been uniformly contended by the railroads that such expenses constituted a taking of their property for public use without just compensation, a deprivation of their property without due process of law, and a denial to them of the equal protection of the law. While there has been some conflict in the decisions, the overwhelming weight of authority at the present time is that such requirements are just, and are not subject to either of the constitutional objections mentioned."

At pages 297-298, the court further said:

"These crossing cases come much nearer to violating the constitutional rights of railroads than does the uncompensated intersection of a public drain. They compel the railroad not only to maintain its road over the highway, but also to construct, often at great expense, a safe passageway for the sole use of the traveling public. * * *

To hold that the public must bear the expense of constructing the bridges in question is not to compel them to pay for something which they have taken in constructing the ditch, but is to impose upon them the burden of constructing and maintaining the plaintiff's roads at the point of intersection. A more reasonable view is that declared by the courts, whose decisions we have quoted, that a railroad corporation takes its franchise authorizing it to construct and maintain its road, subject to the duty of making such modifications in its roadbed, whether the same consists of trestle or grade, as may be necessary to carry the same across such public improvements as highways and public drains. To require this does not deprive the company of its property without due process of law, or deny it the equal protection of the law, but simply charges it with the obligation of maintaining its own road.

> The claim of the plaintiff in this case is peculiarly devoid of merit. It has maintained for years wooden trestles at the points where its lines are intersected by the drain. These structures are temporary and perishable. In their place it demands that permanent bridges, with spans and concrete abutments shall be built and maintained at public expense across the drain. That would not be compensation for injury to private property, but simple enrichment of the company out of the public treasury."

The argument of the court in the case above cited is applicable to the case at bar. The Railway Company's bridge lacks 134 feet of spanning the river. Its bridge is wholly within the channel. It seeks to compel the public to pay for elevating a nuisance; to compel the public to raise its bridge and approaches thereto. The Drainage District simply asks that the Railway Company maintain its bridge at a reasonably safe elevation.

In *St. Louis S. W. Ry. Co.* v. *Miller Levee Dist. No. 2*, 197 Fed. 815, paragraphs 2 and 3 of the syllabus are as follows:

> "A levee district having been expressly authorized by Act, Ark., March 3, 1911 (Sp. & Priv. Laws 1911, p. 89), to construct certain levees along the banks of Red river, in M. county, the fact that, on account of the construction of such levees, *the plaintiff railroad company, which had previously, at great expense, built a bridge across the river, may be compelled to change the same, at its own expense, in order to raise it above the new high-water mark resulting from the confinement of the waters by the levees,* does not constitute a taking, appropriating, or damaging of the railroad company's property without compensation in violation of the Constitution of the United States or of the state of Arkansas.
>
> The construction of a levee across a railroad's right-of-way under statutory authority, which could be constructed without interfering with the movements of com-

plainant's trains, does not constitute an illegal interferance with complainant as an interstate carrier of freight, passengers, and mail."

The decision above cited was in a suit in equity by the railway company to restrain the levee district from constructing a levee above a certain height and across its right-of-way.

"The bill alleges in substance that the construction of a levee will compel the railway company to raise and reconstruct its bridge across Red river, and the approaches leading to the bridge, at an expense of $150,000, and that additional openings in its embankment will be rendered necessary, which will cost $100,000. The bill further alleges that the district, on account of the limitations on its taxing power, will not be able to pay the railway company the amount it will cost to make such changes.

The effect of the contention of the railway company is that having legally constructed its bridge and approaches under conditions then existing, at a height and in a manner warranted by the best engineering skill and foresight, it cannot now, by a change of conditions authorized and directed by the state, be put to the expense of raising and reconstructing its bridge and approaches. In other words, it having some years ago at great expense adjusted itself to conditions as they then existed, those conditions must remain unchanged unless it is compensated for the expense which a contemplated change will necessitate. As additional grounds for an injunction, the railway company alleges that it is an interstate carrier of freight, passengers, and the United States mail, and that, as a result of the construction of the levee, its bridge will be rendered insecure and liable to be destroyed, thereby endangering the lives of its employes and passengers, and interfering with and retarding the carriage of the mail."

At page 823 the court, referring to the contention that the construction of the levee would constitute an illegal interference with interstate commerce, said:

> "The injury to the railway company by the construction of the levee is not a taking of property in violation of the Constitution of the United States; nor is it a taking, appropriating, or damaging of property in violation of the Constitution of the state of Arkansas. Nor is the construction of the levee across the right-of-way of the railway company an illegal interference with it as an interstate carrier of freight, passengers, and the United States mail. The levee can be constructed across the right-of-way without interfering with the movement of trains. *The presumption is that it will be so constructed. It is within the power of the state to authorize the condemnation of a railway right-of-way for such a purpose. St. Louis & S. F. R. Co.* v. *Fayetteville*, 75 Ark. 534, 87 S. W. 1174."

In *C. B. & Q. R. Co.* v. *Board of Sup'rs*, 170 Fed. 665, the court in the second and third paragraphs of the syllabus decides:

> "In Iowa Statute of 1904 (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorizes county boards of supervisors to create drainage districts and to drain lands and change natural water courses to promote the public health, convenience and general welfare, and which, as amended in 1907 (Acts 32d Gen. Assem. 1907, p. 100 c. 95) provides that any railroad company whose right-of-way shall be crossed by any drainage ditch or channel *shall not be allowed damages on account of bridging the same, is not unconstitutional as taking the property of the railroad company without compensation, the state having the right in the exercise of its police powers, for the purposes expressed in such act, to impose expense or burdens on property without the allowance of an equivalent by way of damages.*

Under the Iowa Drainage Law (Acts 30th Gen. Assem. 1904, p. 61 c. 68), which authorized the supervisors of a county to create drainage districts, to construct ditches or change water courses and to appoint commissioners to classify lands within such districts and assess the benefits, the findings of fact of such tribunals are conclusive, and their action can be reviewed by the courts only as to questions of law, and upon the question of the amount of benefits assessed, which by the express terms of the statute is reviewable on appeal."

In the opinion in that case at page 669, Judge McPherson, citing and quoting from the decisions of this Court in *C. B. & Q. Rld. Co.* v. *Ill.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, and *C. B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, says:

"Whatever promotes the health, the safety, the convenience, and the welfare, limited to certain lines, is an exercise of the police power, for which property without compensation can be taken, and expense and burdens can be imposed without an allowance of the equivalent by way of damages. * * *

When a tribunal is empowered or directed to pass upon questions of fact, such findings are final and conclusive as to the facts, but not to matters of law. Therefore the findings of the engineer and board as to the necessities of a new channel, to the end that the public health, convenience, and welfare would be promoted, and as to the location and benefits, and depth and breadth of the new channel, are all findings of fact concerning which the courts can make no inquiry, much less review or set aside. *Ryan* v. *Varga*, 37 Iowa 78; *Slack* v. *Blackburn*, 64 Iowa 373, 20 N. W. 478; *Martin* v. *Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Commissioners* v. *Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Enterprise* v. *Zumstein*, 67 Fed. 1000, 15 C. C. A. 153; cases cited in *People's Bank* v. *Gilson*, (C. C.) 140 Fed. 1."

In *State* v. *M. & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153, the court decided:

"Mandamus proceedings against the Minneapolis & St. Louis Railway Company to compel it to bridge its tracks where they cross city streets, and to construct approaches to such bridges at one end of the same. The Manitoba Railway tracks cross the same streets so near to those of the other company as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over all the tracks of both companies. A like mandamus proceeding was pending against the Manitoba Company to compel it to construct those parts of the bridges over its tracks with approaches thereto. Both causes were required to be tried together. Held not to be error.

Charter of the Minnesota Western Railway Company (Sp. Laws 1853, c. 66) construed as imposing a continuous duty as to restoring public streets to usefulness, by bridging or otherwise, when necessary.

The fact that a railroad has once been lawfully constructed upon the grade of a street does not exempt it from bridging when that becomes necessary.

Mandamus proceedings may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted."

In the opinion at page 157-158, the court says:

"The fact that the respondent formerly laid its tracks, at a considerable expense, upon the grade of the streets, by the authority of the city council, does not exempt it from the duty of bridging when the increased use of both the railway and of the streets render that necessary. *State* v. *Railway Co.*, 35 Minn. 131, 28 N. W. Rep. 3. *From the fact that the city has not yet changed the grade*

of these streets so as to conform to the plan of the proposed bridges it does not follow that this compulsory proceeding may not be maintained. The city authorities had no power to compel these corporations to adopt a plan which they might deem best; and since, as has been decided, it could only be finally determined by judicial decision what the corporations should be compelled to do, it is obvious that any fixing of grade for these bridges, by the action of the city council prior to the decision of the controversy as to whether the corporations were under obligation to bridge the streets, and if so, how it should be done, would have been speculative, and subject to such changes as might become necessary as the result of the decision of the court. The authority of the court to determine the necessity, and the mode of carrying these streets over the tracks, necessarily involves the power to determine the elevation or grade of the bridges; and to this extent the power given by the city charter to the city council to establish and change the grades of streets must be regarded as qualified."

In *City of Emporia* v. *Rly. Co.*, 88 Kan. 611, it appeared that the city of Emporia sought by mandamus to compel the railway company to remove an embankment and carry its tracks upon a viaduct over a public street. The defendant claimed the ordinance was unreasonable, unjust and confiscatory; that it would involve an expenditure of $10,000 by it, without benefit to the city therefrom. *It was also claimed that the city had made no provision for the removal of a sewer which formed an obstacle to the construction of the subway,* and in conclusion it was claimed that by the ordinance, the defendant was deprived of its property without due process of law, and denied the equal protection of the laws, contrary to the Constitution of the United States and amendments thereto.

In that case, as in this, the answer contained a general denial and alleged matters above mentioned, which it was

claimed, rendered the ordinance void. *The plaintiff moved for judgment on the pleadings, and was awarded a peremptory writ of mandamus as in the case at bar.*

In the opinion at page 613, the court said:

> "The courts have no general supervisory power over the policy of municipal legislation. The extent to which the welfare of a city and of the traveling public will be promoted by opening a city street through a railway embankment which wrongfully obstructs it, leaving the railway tracks upon a viaduct, is not a judicial question. *The power of the city over the subject is legislative, and the courts can interfere in such cases only because of some constitutional impediment or lack of legislative authority on the part of the city, or because the conduct of the city is so arbitrary, capricious, unreasonable and subversive of private right as to indicate an abuse rather than a bona fide exercise of power.*"

IV.

The proceedings of the Supreme Court of Kansas, upon which judgment was rendered in this case, do not operate as a denial of the equal protection of the laws or as a deprivation of its property without due process of law; nor do said proceedings constitute a taking of the Company's property for public use.

It appears from the record that the argument of the Company on this proposition is based upon a false hypothesis. The Company assumes:

First, That by its answer it put in issue the reasonableness of the District's order to raise the bridge and clear the channel of obstructions to an elevation of 342.73 feet.

Second, That the Supreme Court of Kansas ignored such an issue, and without requiring any evidence from the District or affording the Company an opportunity to offer evidence upon such an issue, decided the issue against it in effect by awarding a peremptory writ requiring it to clear the channel to an elevation of 342.73 feet.

The record does not show any such issue was raised by the pleadings; therefore, no evidence was proper or admissible thereon. The record shows that the District moved for a peremptory writ on the pleadings; that an issue of law was thus presented between the parties; that it was decided against the Company; that it asked for a rehearing thereof; that it made no application for leave to amend its answer and that a peremptory writ was ordered.

The Railway Company by its brief obscures the real questions involved. It assumes that various affirmative defenses are well plead in its answer, some of which are insufficiently plead, others practically not mentioned.

Some of the matters attempted to be set up would not constitute any valid defense no matter how fully stated. Other matters argued as a defense, if properly plead, might have raised an issue of fact and thus required the overruling of the motion for a peremptory writ.

The Supreme Court of Kansas properly ignored in its decision and opinion any reference to the reasonableness of the order of the Drainage District requiring the bridge to be raised. The answer does not present any such issue or defense. The Company does not allege that the bridge is high enough; that two feet instead of four and one-half would be a sufficient raise; that the channel was of sufficient width and depth or capacity to carry off all floods which might reasonably be anticipated; that the height of the bridge was such that it did not constitute any interference with the free navigation of the river, or any facts raising any issue as to

the reasonableness of the order requiring it to raise its bridge. Nor does the answer allege any fact raising an issue of fact as to the reasonableness of the demand of the District for the removal of "the old bridge superstructure, the old piers, abutments, piling and wreckage" about the same. If the Company had alleged that removal of the present bridge was unnecessary; *that it was willing to repair or reconstruct it;* that the superstructure could be raised; *that piers are necessary on account of width of river;* that the present piers and abutments could be built up four and one-half feet, that the present piers and abutments are constructed of good material, of proper dimensions, rightly located, and sufficient to carry the bridge and withstand floods if so repaired; that the river is not navigated sufficiently to require any raise of the bridge to accommodate navigation or any other matters raising an issue of fact as to the reasonableness of the District's demand for the removal of the old bridge, the questions now presented for decision would be different. Such allegations might be held to raise issues of fact, and would be perhaps an excuse for the claims and arguments of the Company that its bridge is to be taken or destroyed without compensation or due process of law.

The Admissions by the Answer.

The answer admits all the material allegations of the writ. The Railway Company admits by its answer: (1) the corporate existence of the parties; (2) that the Kansas river flows through the Drainage District; (3) that it owns the bridge in controversy; (4) that the District demanded of it the elevation of its bridge and the removal of the old bridge, "as set forth in the petition," and that it refuses to comply.

The first three of the allegations above mentioned are admitted in express terms. The fourth is admitted both expressly *and by the legal effect of the answer.*

The defenses relied upon by the Company are inconsistent with a denial of the material allegations of the alternative writ. If no order or demand was made by the District for the elevation of the bridge or its removal, *then there is no foundation for the affirmative defenses* that the District's order is an interference with interstate commerce; that it would require the raising of the approaches to the bridge; that it would cost over $500,000 to change its bridges and raise such approaches; that the District has no power or authority to make such an order, and that the order is unreasonable and, therefore, void. The affirmative defenses set up in the answer are inconsistent with a denial that an order for the elevation and the removal of the bridge was made and notice thereof given to the Company. The answer was necessarily one of confession and avoidance. *The Company by its answer confesses the truth of all the material allegations of the writ, but seeks to avoid compliance with its command by a statement of new matter as affirmative defenses.* The general denial with which the answer commences is in effect eliminated by an attempt to set up as affirmative defenses: (a) that the District's order is void because an unlawful regulation or interference with interstate commerce; (b) that the raising of the bridge to the elevation demanded would require the raising of the tracks leading to it; that those tracks extend across and along certain public streets of the city of Kansas City, and that said city refuses to change the grade of those streets; (c) that if the consent of the city to the elevation of those tracks was secured, the work of reconstructing them would cost the Railway Company over $500,000; (d) that no plans for the rebuilding of the bridge have been submitted to the Chief of Engineers and Secretary of War of the United States for approval, and that the bridge cannot be raised without permission of said officials; (e) that the Drainage District has no power or authority to require the bridge to be raised.

Paragraphs 15, 16 and 17 of the Company's answer are as follows:

> "*It therefore results*, that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply *with the demand of the plaintiff as set forth* in the petition and writ herein, *since* such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate commerce, abrogate its contracts with the industries which its serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.
>
> "*That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make*, and defendant's compliance therewith would require either a total destruction of its business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas, and in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> "Defendant further says, *that a compliance with the demands of the plaintiff* in the reconstruction of its said bridge and the approaches thereto, if permitted, will cost this defendant a sum in excess of thirty thousand dollars, *and the destruction of its bridge* for railway purposes will injure and damage this plaintiff many hundred thousand dollars."

The allegations quoted constitute an express admission by the company, *that the district has made an order for the elevation of its bridge and the clearing of the channel. Manifestly the legal effect* of the answer is to assert the making of the order and demand for the elevation of the bridge and the clearing of the channel, and refusal to comply on the part of the Company. Such a construction of the answer is the basis of the affirmative defense attempted to be set up therein.

The Law as to Pleading and Practice in Answers in Mamdamus.

In the mandamus case of *Crans* v. *Francis*, 24 Kan. 754-755, Justice Brewer, delivering the opinion of the Supreme Court, said:

"The plaintiff files a motion to quash the answer. * * *

The entire nature of this proceeding is, as we have had occasion heretofore to notice, changed by statute. *State* v. *Jefferson Co.*, 11 Kan. *66. It is now in its form very like an ordinary action. No other pleadings are allowed than the writ and answer. *These pleadings are to be construed, and to have the same effect as pleadings in a civil action; and the issues are to be tried, and further proceedings had, as in a civil action.* Code, Sec. 696. Under those rules, a motion to quash the answer is a challenge of the substance of such answer. It asks that as a whole it be rejected; in other words, it claims that, construed by the ordinary rules of pleading, it contains no defense. If sustained, it strikes out the entire pleading, and leaves the plaintiff's pleading admitted. It is not in the nature of a motion to make specific and definite, for such a motion implies a defense presented, though imperfectly pleaded; neither is it equivalent to a motion to compel defendant to elect, for such a motion implies the existence of two or more defenses. This motion denies any defense. It is like a motion to strike out the answer as containing no defense, or a motion for judgment over the answer, or a demurrer to the answer. It attacks the substance, and not the form, and says that no defense is presented. Strictly, then, if any defense appears in the answer, the motion must be overruled. * * *

The answer commences with a general denial. As there are many facts in and essential to plaintiff's petition which require proof, and are not admitted by a failure to deny under oath, this of itself is a sufficient answer, and compels the overruling of this motion, *unless the matters thereafter admitted in the answer of themselves show that plaintiff is entitled to the relief asked.*"

"Whatever is admitted in the special defense operates as a modification *pro tanto* of a general denial and is to be taken as true without proof." *Wiley* v. *Keokuk*, 6 Kan. 94.

In *Fetzer* v. *Williams*, 80 Kan. 554, the court in its opinion, page 557, on this point says:

"The decisions are elaborately reviewed in *Seattle National Bank* v. *Carter*, 13 Wash. 281, and in a note thereto in 48 L. R. A. 177. This court has long been committed to the propositions that a general denial is regarded as modified by admissions made in stating a special defense, which is only an application of the broader principle that every pleading must be consistent within itself. (*Wiley* v. *Keokuk*, 6 Kan. 94; *Butler* v. *Kolback*, 8 Kan. 668.)"

It is true that in Kansas the statute permits a defendant "to set forth in his answer as many grounds of defense as he may have." Notwithstanding this provision, "the pleader may not rely in the same plea on absolutely inconsistent defenses."

In the case at bar, the District either made or did not make a demand on the defendant for the raising of its bridge. The defendant well knew whether such demand was made upon it or not. If no demand was made, a denial that such demand was made was the proper and only necessary defense. If the demand was made, then the only proper defense was matter in confession and avoidance. The defendant Company recognizes this in its pleading by attempting to set up new matter in confession and avoidance of a demand which it admits both expressly and by the legal effect of its pleading to have been made. It cannot be true that the demand was unreasonable and arbitrary and at the same time be true that no such demand was made. The inconsistency between a general denial and

the matters relied upon by the defendant Company as special defenses is direct and certain and not a matter of inference, argument or implication.

A Motion for Judgment on the Pleadings Proper Practice When the Answer Is Insufficient.

In 26 Cyc. 489, the author says:

> "It is common practice for relator to move for a peremptory writ on the return, or on the papers equivalent to the return, instead of pleading or joining issue on the return, or going to trial. Such a motion operates as a demurrer to the return or other defensive matter, so as to admit the truth of all matters sufficiently pleaded therein. But matter not well pleaded in the return or answer, such as conclusions of law, will not be taken as admitted."

In *Harshman* v. *Knox*, 122 U. S. 306, p. 320, 30 L. Ed. 1152, 7 Sup. Ct. Rep. 1171, Justice Matthews, in the concluding paragraph of the opinion, says:

> "The return of the respondents, therefore, to the alternative writ of mandamus is insufficient in law, and the Circuit Court erred in not awarding to the relator a peremptory writ of mandamus. For that error, the judgment is reversed, and the cause remanded with directions to award a peremptory mandamus."

In 13 Encyl. Pl. & Pr. 777, the rule is stated as follows:

> "When the plaintiff's allegations are sufficient if true, and the pleadings filed by the respondent present no issue of fact and virtually amount to no answer, the proper practice is to direct the issue of a peremptory writ."

See also to same effect High's Extraordinary Legal Remedies, Sec. 477.

In the recent case of *Emporia* v. *Rly. Co.*, 88 Kan. 611, a mandamus suit, the plaintiff moved for and recovered final judgment on pleadings. In that case the answer of the railway contained a general denial and also alleged matters in avoidance, including a claim that it was being deprived of its property in violation of the Constitution of the United States.

In *Hutchison* v. *Myers*, 52 Kan. 290, in the second paragraph of the syllabus, the court decides:

> "Where the answer of defendant admits the cause of action stated in plaintiff's petition, and its averments are insufficient to constitute a defense, the court may, upon motion of plaintiff, allow and enter judgment in his favor upon the pleadings."

In the opinion, at page 295, Chief Justice Johnston, speaking for the court, says:

> "The motion for judgment on the pleadings was equivalent to a demurrer to Hutchison's answer, and is a common and permissible practice. If the averments of the petition were sufficient, and the answer did not allege a defense, and no amendment was asked for or allowed, plaintiff was certainly entitled to a judgment."

Confession and Avoidance.

In 26 Cyc. 452-489, the rules of pleading in returns to alternative writs of mandamus, p. 452, are stated as follows:

> "Instead of traversing the matters set forth in the alternative writ or petition, respondent may plead by way of confession and avoidance, and if he relies on new matter excusing non-performance of the commands of

the writ, this must be set up in the return. *Great strictness of pleading is required in returns which set up matter of confession and avoidance.*

Relator is entitled to the benefit of all admissions made by respondent in the return (p. 453).

The return or answer must set out the facts relied on as an excuse for non-performance so that relator may traverse them. Accordingly it is insufficient if it states conclusions of law without alleging the facts on which they are based" (p. 454).

In High's Extraordinary Legal Remedies, Secs. 472, 473 and 474, the author states that where the answer is in its nature *a confession and avoidance* its allegations must be direct and positive and state the facts with precision and certainty.

In 13 Encyl. of Pl. & Pr. 725, the author says:

"The respondent in mandamus may either deny or confess and avoid; that is, he may either deny the facts upon which the relator bases his claim to relief, or, admitting those facts to be true, may set up other facts which show that the defendant is under no obligation to perform the commands of the writ. *Every answer must do one or the other of these things.*

When the respondent sets up facts in confession and avoidance, those facts must be stated with precision and certainty, according to the rules of pleading required in the answer.

It is not permissible to set up inconsistent or repugnant defenses."

The case of *Woodruff* v. *New York & N. E. R. Co.*, 59 Conn. 63, 20 At. 17, is illustrative of the law. The sufficiency of the answer of the railway company in a mandamus suit to

compel it to improve a street crossing was involved. The court in its opinion (at page 20) says:

> "The return of an alternative writ is demurrable unless it shows a right to refuse obedience to it; *and it must state the facts which justify such refusal clearly, specifically, and with such sufficient certainty that the court can see at once that such facts, if admitted or established, do furnish a legal alternative for obedience to the writ.* High Extr. Rem., Secs. 449-460; *State* v. *Lean*, 9 Wis. 279; *Springfield* v. *Commissioners*, 10 Pick. 59, Mos. Mand. 210; *Bank of Albany* v. *Commissioners*, 10 Wend. 25.
>
> "There is in the return before us no direct denial of the facts alleged in the alternative writ, and it is possible that such a denial, had it been made in the case, would not have withstood the test of a demurrer. It would deny in terms what the court would be bound to know judicially to be true, *i. e.*, the existence and the terms of the legislative resolutions; *while the order made by the commission, and the non-compliance therewith, are admitted, or made a part of the return itself.* We need not discuss this. A general denial puts in issue the existence of those facts, which if true, constitute a *prima facie* cause of action or ground of defense. *When these facts exist, but, by reason of some extraneous features or elements affecting them, they do not produce the otherwise necessary result, that element which destroys the prima facie legal effect of the facts is not put in issue by such a denial. It is new matter, and must be specially pleaded.* And so, where a legal right to refuse obedience to a writ can be shown in no other way than by setting forth such extraneous features or elements, a return that omits them is clearly bad on demurrer."

In *C. K. & W. R. Co.* v. *Comm'rs of Chase County*, 49 Kan. 399, the court in the third paragraph of the syllabus decides:

> "In a proceeding of mandamus, to compel the performance of a public duty, *no formal demand upon the*

defendants is necessary where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing."

In *Northern Pac. R. Co.* v. *Washington*, 142 U. S. 492, 35 L. Ed. 1092, 12 Sup. Ct. Rep. 283, at page 289, the court in its opinion says:

> "The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (*Attorney General* v. *Boston*, 123 Mass. 460, 479; Code Wash. T., Sec. 2171); *and no demand upon the defendant was necessary before applying for the writ.* (*Com.* v. *Commissioners*, 37 Pa. St. 237; *State* v. *Board*, 38 N. J. Law 259; *Mottu* v. *Primrose*, 23 Md. 482; *Attorney General* v. *Boston*, 123 Mass. 460, 477.)"

The Judgment Sufficient in Form.

The Railway Company refers to the fact that the judgment of the Supreme Court of Kansas in cases at bar, Nos. 313 and 314, was the same. It is proper practice to render a judgment awarding a peremptory writ, before the issuing of the writ itself.

The statute of Kansas controls the matter and provides that a judgment shall precede the writ.

Section 6319 Gen. Statutes of Kansas 1909, is as follows:

> "*If judgment be given for the plaintiff*, he shall recover the damages which he shall have sustained, to be ascertained by the court or jury or by referees, as in a civil action, and costs; *and a peremptory mandamus shall also be granted to him without delay.*"

In 26 Cyc. 483 the rule is well stated:

> "The judgment in mandamus proceedings is distinct from the final or peremptory writ which is issued in pursuance of the judgment for the relator. The writ recites the facts showing why it should issue, the judgment directing it, the command of the acts to be performed, and a provision for return. The judgment shows the determination of the court on the merits, directs or denies the writ, and awards the damages and costs, if any."

A writ of error will lie from a judgment awarding a peremptory writ.

1 Encyl. U. S. Court Rep. 928, citing *Columbia Ins. Co.* v. *Wheeler*, 7 Wheat 534, 9 L. Ed. 516; *Kendall* v. *U. S.*, 12 Pet. 524, 9 L. Ed. 1181, cited and approved in *Holmes* v. *Jennison*, 14 Pet. 540, 10 L. Ed. 579.

The Allegations of the Writ Not Admitted.

The only allegations of the alternative writ not admitted to be true by the Railway Company are: that the Kansas river is a navigable stream; that it overflowed its banks in 1903; that a large part of the city of Kansas City was flooded and millions of dollars' worth of property lost by reason thereof; that harbor lines were established by the United States, which lines coincide with those established by the Drainage District for a levee along the banks of the river, and that the plaintiff has authority to determine the elevation of bridges across the Kansas river and to compel the raising of bridges by mandamus in accordance with its orders. These are allegations of matters of fact and law of which the trial court, *and this Court as well*, will take judicial notice. Section 5724, Genl. Sts. of Kan. 1909, provides that, "neither presumptions of

law nor matter of which judicial notice is taken need be stated in a pleading."

Senate Document No. 160, 58th Congress, Second Session, is a letter from the Secretary of War to the President of the Senate, transmitting therewith reports of a board of engineers on the establishment of harbor lines in Missouri and Kansas rivers at Kansas City and on the subject of obstructive bridges and flood conditions in the Kansas river at and near its mouth. This document was printed by order of the Senate. At page 4 the Kansas river is reported to be navigable and the establishment of harbor lines discussed. At pages 5 to 7 this document contains a report as to obstructive bridges over the Kansas river at Kansas City, Kansas, in which it is said:

> "The Kaw river, for a distance of 17,000 feet above its mouth, is in a condition that constitutes a dangerous menace to life and property on its banks. The channel has been encroached upon by riparian owners until its normal average width of about 850 feet (minimum 540 feet), as shown by the meander lines of 1856, is reduced to an average of about 590 feet, with a minimum in one place of 420 feet.
>
> "*Bridges have been built with more piers than are necessary.* The piers have not been carried down to rock, but have been founded on piles, the masonry work extending but a short distance below low water. To protect the foundations from scour, immense quantities of loose rock have been deposited around the piers until each pier is virtually an island of rock in the river. Between the piers the falsework piles used during construction have generally been cut off at or near low water and left in the stream.
>
> Besides these obstructions caused by the bridges there have been built from time to time stone dikes extending into the stream from both banks. Other obstructions, the purpose and history of which cannot be determined, exist all along this part of the river.

The result is that the natural channel of the stream has been materially diminished, its bottom has been made so rigid that it will not yield to scour during high water, and its original capacity to carry off floods has probably been *reduced by one-half*."

As to the navigability of the river at Kansas City, at page 6 of this document, it is said:

"The Board submits the following data upon the status of this stream as a navigable waterway of the United States:

Steamboats have ascended the river as far as Fort Riley, Kan. This was before any artificial obstructions in the form of bridges or dams had been made.

The Government has twice required reports upon the feasibility of improvement works on the stream in the interests of navigation.

In 1898 the Government built certain works for the improvement of the river a short distance above the mouth, pursuant to Act of Congress of July 1, 1898, which provided that the sum of twenty thousand dollars, or so much thereof as may be necessary, shall be expended in widening and cleaning out the mouth of the Kaw river where it empties into the Missouri river at Kansas City.

Although navigation is almost entirely cut off by the artificial obstructions in the channel, there was until recent years considerable traffic in sand within the limits of Kansas City, and if the channel were again opened there would be an active business in this line.

The Government has never exercised any supervision over bridges built across the Kaw river.

Congress has in one case granted authority to construct a bridge over the river. (Act of March 17, 1886.)

The Government has on different occasions caused obstructions to be removed from the stream within the limits of Kansas City, Kan., and its authority to do this has been acquiesced in without protest except in one case.

The navigable portion of the river lies wholly in the state of Kansas, the mouth being a few hundred feet above the point where the state line between Kansas and Missouri intersects the right bank of the Missouri river."

At pages 7 to 23 the report treats of flood conditions at and near the mouth of the Kansas river and estimates (p. 12) the loss from the flood of 1903 at from $20,000,000 to $30,000,000.

The attention of the Court is called to the annual report of the Chief of Engineers of the United States for 1910, pages 1018 and 1833. This report shows that on June 24, 1910, harbor lines were duly established by the Secretary of War of the United States for the Kansas river at and beyond the bridge in controversy, pursuant to a resolution of Congress of date February 16, 1909, authorizing the Secretary of War to fix and etsablish pier-head and bulk-head lines, either or both, in the Kansas river at Kansas City, Kansas, beyond which no piers, wharves, bulk-heads or other work shall be extended or deposits made, except under such regulations as shall be described from time to time by the Secretary of War.

This Court may also take judicial notice of the maps accompanying the said report, establishing harbor lines, on file in the office of the Chief of Engineers of the United States in compliance with the resolution of Congress aforesaid, and indorsed as follows: "In compliance with public resolution of Congress February 16, 1909. Harbor lines for Kansas River at Kansas City, Kansas, mouth to Argentine wagon bridge. Kansas City, Mo., May 20, 1910, to accompany report of this date on public hearing January 25-27, 1910. Authorized by the Chief of Engineers, U. S. Army. Edward H. Schulz, Major Corps Engineers, U. S. A. War Department, Washington, D. C., June 24, 1910. Approved: Robert Shaw Oliver, Acting Secretary of War."

The public officers' report and map above mentioned show the establishment of harbor lines, the width of the channel, the location and number of piers and abutments of the bridge in controversy and the location with reference to the public streets of Kansas City, Kansas. From this map it appears that both of the abutments of the defendant's bridge are within the harbor lines, and that it is 185 feet from the west harbor line to the west abutment of the bridge.

The court is also requested to take judicial notice of Document No. 94 of the House of Representatives, 62nd Congress, First Session, printed by order of the Committee on Rivers and Harbors on July 19, 1911, which document contains a report of the survey of the Kansas river from its mouth to Argentine, Kansas, made pursuant to an Act of Congress of March 3, 1909.

At page 14 of that document, it is said:

> "The following are the correct data for bridges, including their modifications, to conform to the approved harbor lines and for a clear elevation equal to the flood height of 1903." (Here follows a tabulated statement as to the location, elevation, length, number of piers and cost of reconstructing bridges over the Kansas river in the Kaw Valley Drainage District.)

The report as to the defendant's bridge is as follows:

> "No. 10, Kansas City Belt. Approximate distance above mouth, 13,151 feet. Present lowest point of superstructure, 337.77 feet. Required lowest point of superstructure, 342.73 feet. Required additional height, 4.96 feet. Distance of the face of present abutment to harbor line, left bank, 135 feet; right bank, 4 feet. Approximate required additional length, 135 feet. Number of piers, 1. Approximate cost of *reconstruction*, $28,000."

The document last above cited also contains as a part thereof a map of the Kaw Valley Drainage District, purporting to have been made to accompany said report of December 9, 1910, by Edward H. Schulz, Major Corps of Engineers, U. S. A.

> "Maps and reports made by authority of law by public officers may be judicially noticed by an appellate court." (7 Ency. of Evidence 882.) *Bryan* v. *Forsyth*, 19 Howard 334; *Watkins* v. *Holman*, 16 Peters, page 35; *Gregg* v. *Forsyth*, 24 Howard 179; *U. S.* v. *Teschmaker*, 22 Howard 405; *Jones* v. *U. S.*, 137 U. S. 202, p. 214, 11 Sup. Ct. Rep., pp. 84-85.

In *Kirby* v. *Lewis*, 39 Fed. 67, the court decided:

> "The official report and correspondence of public officers of the state and the United States, relating to the swamp lands of the state, and published by authority of the Legislature, are public documents, *which the court has a right to consult, even if not made formal proof in the case.*"

See also, 17 A. & E. Ency. of L. 901; 9 A. & E. Ency. of L. 880.

An appellate court must take notice of everything which the court whose judgment it is reviewing, is bound to notice. *Tischner* v. *Rutledge*, 35 Wash. 285, 77 Pac. 388; *Smith* v. *City*, 27 Kan. 528.

An appellate court will not interfere with the trial court's action based upon its judicial knowledge, unless it has manifestly erred. *People* v. *Mayes*, 113 Cal. 618, 45 Pac. 860; 7 Ency. of E. 882-883.

The Supreme Court of Kansas takes judicial notice of the navigability of the Kansas river. *Wood* v. *Fowler*, 26 Kan. 682; *Hoyt* v. *Russell*, 117 U. S. 401.

The Supreme Court of Kansas refers to the reports, documents and maps above mentioned (copies of which are deposited with the clerk of this Court) in its opinion (pp. 44-45 Record.)

V.

The judgment is within the scope of the pleadings. The pleadings gave the Supreme Court of Kansas jurisdiction over the bridge and the river. The court had jurisdiction to order the raising of the bridge or its removal, or both.

The law gives the Supreme Court of Kansas original jurisdiction in mandamus. The motion and affidavit for the alternative writ, the alternative writ, and its service and the appearance of parties gave the court jurisdiction of this particular case. The cause of this suit is the defendant's bridge; that bridge is the object or subject-matter of this suit. In both the motion and affidavit for, and the alternative writ, it is alleged:

> "That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed 'the Belt line bridge.' "
>
> "That heretofore and by virtue of the power in it vested, the plaintiff on or about the 18th of April, 1911, notified the defendant to raise its said bridge 4.73 feet or to the required height of 342.73 feet above St. Louis Directrix *and to remove the old bridge, superstructure, abutments, piers, piling and wreckage.* That the said defendant has failed, neglected and refused so to do."
>
> "Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and

proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 342.73 feet above Saint Louis Directrix *and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage;* that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream and to flood the inhabitants contiguous thereto, and for such other and further relief as to the court may seem right and proper."

The allegations of the writ and the petition for it gave the trial court jurisdiction not only to consider the matter of raising the bridge, *but also invested the court with jurisdiction to order the removal of the "old bridge, superstructure, abutments, piers, piling and wreckage."* The prayer of the District was for a writ requiring the defendant to commence at once and proceed as rapidly as possible with the raising of its bridge *"and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage."*

"Jurisdiction of the subject-matter is obtained by the filing of such a pleading or petition as will bring the action within the authority of the court.

It is not necessary that the pleading shall state a cause of action, or be so drawn as to withstand a demurrer, but it must be sufficient to show that the subject-matter of the action is within the jurisdiction of the court." (See Works on Courts and Jurisdiction, Sec. 11, p. 30, and 1 Bailey on Jurisdiction, Sec. 7, p. 6.)

The matter decided, to-wit, that the defendants remove from the Kansas River *"all obstructions of every kind and*

character" where its bridge crosses the stream and commanding the company to "clear such channel to a height of 342.73 feet," etc., was within the issue; was submitted for decision by the pleadings. The allegations relative to the removal of the old bridge and its parts is just as prominent and positive as the allegation as to the defendant raising its bridge. The Company had the opportunity to contest and did contest in the trial court the matter of removal of the old bridge and its parts. The Company *has had an opportunity to be fully heard* and has been heard by a competent court, as to the right of the District to recover the judgment rendered. The court having by the pleadings jurisdiction to render the judgment complained of by the Company, it necessarily follows that the judgment is an adjudication of all matters necessary to be decided in order to render such a judgment. In other words, it must be held that the Supreme Court found that there was no defense stated in the answer and that the material allegations of the writ, including the allegation that the District demanded the removal of the "old bridge, its superstructure, abutments and piers," were expressly admitted by the answer or by its legal effect.

The trial court was not bound to order the bridge raised. It could order such judgment as the facts shown by the pleadings and the law applicable warranted.

In Kansas a plaintiff recovers such judgment as the cause of action established entitles him regardless of his prayer. In mandamus under the Kansas statute, a plaintiff on motion for judgment over the answer is entitled to peremptory writ. In Kansas a peremptory writ may be allowed in the first instance. *If so, it could certainly be allowed after a hearing on the motion and affidavit set forth in the record.*

Sections 6313, 6314, 6317 and 6318 of the Kansas Code of procedure are as follows:

> "Sec. 6313. When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, *a peremptory mandamus may be allowed in the first instance;* in all other cases the alternative writ must be first issued.
>
> Sec. 6314. The motion for the writ must be made upon affidavit, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, *or may grant the writ without notice.*"
>
> "Sec. 6317. If no answer be made, a peremptory mandamus must be allowed against the defendant; *if answer be made, containing new matter, the same shall not, in any respect, conclude the plaintiff, who may, on the trial or other proceeding, avail himself of any valid objections to its sufficiency,* or may countervail it by proof, either in direct denial or by way of avoidance.
>
> Sec. 6318. No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect, *and are to be construed, and may be amended, in the same manner as pleadings in a civil action;* and the issues thereby joined must be tried and the further proceedings thereon had in the same manner as in a civil action."

The Drainage District stated a cause of action for the raising of the bridge *and* the removal of the old abutments, piers and wreckage from the channel. The court granted only a part of the relief asked. It gave judgment for the removal of all "obstructions" to an elevation of 342.73 feet. This judgment does not prevent *but permits the raising or reconstruction of the bridge.* It does not command the defendant to raise the bridge. Only "obstructions" are required to be removed from the river.

Assuming that the Company cannot be compelled to reconstruct its bridge without its plans being first approved by the War Department, it does not follow that a peremptory writ cannot be issued compelling it to ask such assent or remove its bridge.

The case of *People* v. *Board of Sup'rs*, 142 N. Y. 217, 36 N. N. E. 1062, was an action of mandamus to compel the rebuild- of a bridge over a navigable stream, the court decides:

> "It is no reason for refusing mandamus to the boards to build the bridge that, before construction can be begun, the location and plans will have to be approved by the Secretary of War. (Act Cong., Sept. 19, 1890, c. 907, Sec. 7.)"
>
> * * * *
>
> "It is no reason for refusing the proper peremptory writ that the alternative writ asks too much, or not quite the right, relief."

In the opinion, at page 1064, the court says:

> "The alternative writ is now equivalent to the complaint in an action, and the demurrer and return stand as a demurrer or answer in an ordinary suit. If the substantial right is set out in the writ, the proceeding will not fail because the relator asks for too much, or mistakes to some extent the relief to which he is entitled. The court, in awarding the peremptory writ, may mold it according to the just rights of all the parties. (Code Civ. Proc., Secs. 2067, 2090; *People* v. *Nostrand*, 46 N. Y. 375; *People* v. *Dutchess & C. R. Co.*, 58 N. Y. 152; *People* v. *Wilson*, 119 N. Y. 515, 23 N. E. 1064.)
>
> The objection that under Section 7 of Chapter 907 of the Act of Congress passed September 19, 1890, the boards of supervisors cannot proceed to construct the bridge until the location and plans shall have been approved by the Secretary of War, may excuse them in a proceeding for contempt *in case it appears* that such con-

sent has been sought in good faith, and cannot be procured. We think the existence of this statute does not justify inaction, and the matter can be provided for in the peremptory writ, if one shall be issued."

A Writ of Mandamus May Be in the Alternative.

In *Ralls County* v. *U. S.* 105 U. S. 733, 26 L. Ed. 1220, the court decided:

> "Where judgment has been duly obtained in Missouri against a county upon coupons detached from its bonds, no defense which questions their validity can be pleaded to a mandamus commanding the County Court to pay the judgment from moneys in the treasury, or raise the means therefor by the levy of a special tax."

In the opinion, 105 U. S. 734, Mr. Chief Justice Waite said, for this Court:

> "After the judgment was rendered in the Circuit Court, the present suit was begun by the United States, on his relation, and requiring the County Court by mandamus to pay the amount due out of moneys in the treasury of the county, or, if that could not be done, to raise the necessary means by the levy of a special tax."

In the concluding paragraph of the opinion, the court further says:

> "*The writ as issued was properly in the alternative, to* pay from the moneys already raised, or levy a tax to raise more. It will be time enough to consider whether the command of the writ that the court cause the tax to be collected is in excess of the requirements of the law, when

the justices of the court are called on to show why they have not obeyed the order. The same may be said of the order to draw the warrant on the treasurer."

"The prayer in the petition for a mandamus may properly be disregarded, and the final order made to conform to the facts alleged and established."

Osage Valley & S. K. R. Co. v. *Morgan County Court*, 53 Mo. 156.

"The final order in mandamus need not conform to the prayer of the petition, *nor to the mandatory clause in the alternative writ*, but may be framed according to the facts established. *School Dist. No. 1* v. *Board of Education of Town of Lamar*, 73 Mo. 627."

"Where plaintiff in mandamus demands greater relief than he is entitled to on the facts stated in his affidavit, he will not thereby be precluded from obtaining less relief, to which he is entitled under the facts stated. *Smith* v. *Lawrence*, 2 S. D. 185, 49 N. W. 7."

In *Howard* v. *Huron*, 6 S. D. 180, 60 N. W. 803, page 808, the court said:

"We fully agree with the reasoning of the learned Supreme Court of Ohio in *State* v. *Crites*, 48 Ohio St. 142, 26 N. E. 1052. In that case the court says: '(4) The earlier doctrine in mandamus was that the peremptory writ should strictly follow the alternative one. That rule, in all its strictness, is still followed in many of the more modern cases. * * * Valid reasons for this rigid rule are not at all apparent. The civil remedy by mandamus is to enforce civil rights, and why the proceeding therein should not be as elastic as in civil actions has not been satisfactorily answered by the cases that adhere to the rule. In civil actions no one would be heard to contend, at this late day, that, because the plaintiff had claimed

more than upon the trial he could maintain, it would be fatal to his right to recover that to which he was entitled upon the facts and the law as they appeared upon the trial. In mandamus is it so much less difficult for a party to determine in advance the exact measure of his rights, that if he makes a mistake in that regard, by claiming more than he can maintain upon the trial, he is to be sent out of court, mulcted in costs, and compelled to begin *de novo?* If he claims less than his right, no more than is claimed will be awarded him. If the rule should be maintained in all its strictness, the remedy of mandamus will be a perilous one to invoke in cases where more than a single act or right is sought to be enforced. If less than his full right is claimed by a party, he will not recover that not claimed, but must encounter the delay of another proceeding, and the hazard of a plea of *res adjudicata* in respect of it, while if he claims too much he will be denied any relief whatever, however clearly his title may appear to a large part of his demand. In many cases courts have sought to escape from the extreme severity of the rule—in some instances by holding the difference between the two writs to consist of immaterial matters of detail, while in others an amendment of the alternative writ was allowed, making it conform to the peremptory writ. *State* v. *Acting Board of Aldermen*, 1 S. C. 31; *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561; *State* v. *Baggott*, 96 Mo. 63, 8 S. W. 737; 2 Dill. Mun. Corp. (3d Ed.), Sec. 879. * * *

Treating the petition, and the alternative writ based upon it, as the foundation of the relator's claim, bearing the same relation to the proceedings in mandamus that the petition does to the proceedings in a civil action, and it is clear he is entitled to no relief beyond that which the petition and alternative writ show him entitled to, and if he wishes other relief he must, as in civil actions, set forth by an amendment the facts that establish his right to it; but where, upon the trial, he is able to establish by proof, or maintain in law his title to a part only of the relief sought, there seems now to be no reason for refusing to grant so much thereof as under the facts and law he is entitled to, without first amending the alternative writ."

In *State* v. *Weld*, 39 Minn. 426, 40 N. W. 561, in the opinion the court says:

> "The statute allows amendments of the writ and answer as in case of pleadings in civil actions, and provides that the issues are to be tried and further proceedings had in the same manner as in civil actions. The proceeding is therefore now so elastic that the peremptory writ need not precisely follow the alternative one, *but the court, upon the hearing, may grant the relief in any form consistent with the case made by the complaint, and embraced within the issues.* *State* v. *Railway Co.*, 39 N. W. Rep. 153; *People* v. *Railroad Co.*, 58 N. Y. 152."

In *Gunn* v. *Lauder*, 10 N. D. 389, 87 N. W. 999, the court, at p. 1005, says:

> "It is further true that the ancient and stricter rule in mandamus has been relaxed by modern adjudications, under which a final writ 'may be in any form consistent with the case made by the complaint presented, and embraced within the issues.'"

In *School District* v. *School District*, 33 Colo. 43, 78 Pac. 690, the Supreme Court of Colorado decided:

> "That mandamus commanding the school district to pay the amount of claims which had been subsequently ascertained, from the funds realized from the levy of 1903, should be denied, but the district should be compelled to certify a special levy to the city council to meet such claims, or to include such a levy in its certificate of the 1904 levy for ordinary purposes."

In the opinion the court, citing *Ralls Co.* v. *U. S.*, 105 U. S. 733, says:

> "It does not follow, however, that petitioners are not entitled to any relief under the facts of this case,

although they are not entitled to that which was awarded. Under the ancient practice a peremptory writ of mandamus could not be amended, and must issue in the same form as the alternative writ. In *Ralls County Court* v. *U. S.*, 105 U. S. 733, 26 L. Ed. 1220, where the command of the writ of mandamus was to pay from money already raised, or levy a tax to raise more, it was held that a writ thus issued in the alternative was proper. However that may be, we are satisfied that, where no alternative writ issued, but the peremptory writ was the only one allowed, *if the granted relief was not proper, still, if the petitioner or relator is entitled to some kind of relief which was included in his prayer, he should receive it, and the necessary amendments in pleadings and processes may be made to conform thereto. The modern authorities sustain this conclusion.* Merrill on Mandamus, Sec. 294; *State* v. *Supervisors*, 20 Wis. 79, 84; *People ex rel.* v. *Supervisors*, 27 Cal. 655, 684; *People ex rel.* v. *Supervisors*, 142 N. Y. 271, 278, 36 N. E. 1062; *Odendahl* v. *Russell*, 86 Iowa 669, 53 N. W. 336; *Dew* v. *Judges of Sweet Springs*, 3 Am. Dec. 639; 13 Enc. Pl. & Pr. 751 *et seq.*"

In conclusion, the Drainage District submits that an examination of the record shows that the Railway Company in its brief and argument has overlooked or misapprehends the legal effect of the pleadings upon which the judgment complained of is based, and that the decision of the Supreme Court of Kansas appears from the record to be correct.

Wherefore, the defendant in error prays:

First. That this appeal be dismissed for want of jurisdiction.

Second. That if such relief be not granted, the judgment of the Supreme Court of Kansas be affirmed, and that the plaintiff in error have all other proper relief.

THOMAS A. POLLOCK,
Attorney for the Kaw Valley Drainage District of Wyandotte County, Kansas, Defendant in Error.

19

Office Supreme Court, U. S.
FILED.
OCT 16 1912
JAMES H. McKENNEY,
CLERK.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*
No. 313

KANSAS CITY TERMINAL RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*
No. 314

BRIEF IN OPPOSITION TO MOTION TO DISMISS, AFFIRM, OR ADVANCE.

SAMUEL W. MOORE,
SAMUEL W. SAWYER,
Attorneys for Plaintiffs in Error.

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—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*
No. 734.

KANSAS CITY TERMINAL RAILWAY COMPANY, *Plaintiff in Error,*
vs.
THE KAW VALLEY DRAINAGE DISTRICT OF WYANDOTTE COUNTY, KANSAS, *Defendant in Error.*
No. 735.

BRIEF IN OPPOSITION TO MOTION TO DISMISS, AFFIRM, OR ADVANCE.

STATEMENT.

These cases are here on writs of error to the Supreme Court of Kansas, the opinion of the court being reported in 123 Pac. Rep., 991.

The Kaw Valley Drainage District, hereinafter referred to as the Drainage District, instituted two actions by filing in the Supreme Court of Kansas its applications for writs of mandamus against The Kansas City Southern Railway Company, hereinafter referred to as the Southern Company, and against the Kan-

sas City Terminal Railway Company, hereinafter referred to as the Terminal Company, upon which the alternative writs of mandamus were issued.

The two cases are substantially identical in pleadings and issues, except that in the case of the Terminal Company one issue is presented which is discussed in this brief under paragraph III, which is not contained in the case against the Southern Company. The purpose of the writs of mandamus in each case was to compel the Railway Company to elevate its railroad bridge across the Kansas River at Kansas City, to a prescribed height. The defences of the two companies are the same, except that in the case of the Terminal Company there was a contract between the Drainage District and the Terminal Company preceding the construction of its bridge, and this contract fixed the elevation of the bridge, its length, location of piers, etc., and it is insisted by the Terminal Company that the obligation of this contract was impaired by the subsequent order of the Drainage District which it is sought to enforce by the writ of mandamus in this case. This is the one feature of the case of the Terminal Company which is not contained in the case of the Southern Company. The Railway Companies filed their answers and returns to the alternative writs. The Drainage District filed its replies to these answers, but afterwards withdrew its replies and filed a motion to have the case set down for hearing upon the alternative writs, and the answer of the Railway Companies, which was accordingly done. No testimony was taken. As these pleadings present the entire controversy before the Kansas Supreme Court, and therefore before the court here, they are set forth at length.

The alternative writ in the Southern case, which is the same as the alternative writ in the Terminal case, (except that in the Terminal writ the defendant is directed to raise its bridge 4.96 feet or to a height 342.73 feet above the St. Louis Directrix) is as follows, the caption being omitted:

ALTERNATIVE WRIT.

The State of Kansas to the defendant, The Kansas City Southern Railway Company: Greetings:

Whereas it has been made to appear to us by affidavits in words and figures as follows:

AFFIDAVIT AND MOTION FOR A WRIT OF MANDAMUS.

Comes no wthe plaintiff and files its motion and affidavit for a writ of mandaus and alleges and shows to the court:

That the plaintiff, The Kaw Valley Drainage District, Wyandotte County, Kansas, is a public corporation duly organized and existing under and by virtue of Chapter 215 of the Session Laws of 1905 of the State of Kansas.

That the defendant, The Kansas City Southern Railway Company, is a corporation duly organized and existing according to law.

That the Kansas river flows through the Kaw Valley Drainage District and is a navigable stream; that said stream overflowed its banks in 1905 and a large part of the city of Kansas City, Kansas, was flooded and millions of dollars worth of property lost by reason thereof.

That the Federal Government established harbor lines along said river, which harbor lines coincide substantially with the lines established by the plaintiff herein for a levee along the banks of said stream.

That under and by virtue of the Statutes of the State of Kansas, the plaintiff herein was given authority to determine the height of the lowest point of the superstructure of all bridges across the said Kansas River within said district, and further empowered by mandamus to compel the raising of bridges in accordance therewith.

That the defendant herein owns a bridge across the Kansas River within the Drainage District which is usually termed "the Ohio bridge."

That heretofore and by virtue of the power in it vested, the plaintiff on or about the 15th of July, 1911, notified the defendant to raise its said bridge 6.5 feet or to the required height of 240.26 feet above St. Louis Directrix and to remove the old bridge, superstructure, abutments, piers, piling and wreckage. That the said defendant has failed, neglected and refused so to do.

Wherefore the plaintiff prays a writ of mandamus to the defendant requiring it to commence at once and proceed as rapidly as possible with the raising of its said bridge so that the lowest point of superstructure will be 340.26 feet above Saint Louis Directrix and that it remove the old bridge, superstructure, abutments, piers, piling and wreckage; that the raising of said bridge and the removing of said obstructions is absolutely necessary in order to prevent overflow of the Kansas River by reason of the fact that at the present elevation said bridge and said obstructions obstruct the flow of water and cause the same to overflow the banks of said stream

and to flood the inhabitants contiguous therto, and for such other and further relief as to the court may seem right and proper.

KEPLINGER AND TRICKETT,
Attorneys for Plaintiff.

State of Kansas, Wyandotte County, ss.

W. H. Daniels, being duly sworn on oath, says that he is the president of the Board of Directors of The Kaw Valley Drainage District, Wyandotte County, Kansas; that he has read and knows the contents of the above and foregoing affidavit and motion for a writ of mandamus and that the matters and things therein stated and set forth are true.

And affiant further says that this cause is filed in the Supreme Court instead of in the District Court of Wyandotte County, Kansas, for the following reasons:

That the flood season is usually in the months of June and July in each year; that the plaintiff has waited thinking that the defendant would raise its bridge without the necessity of a suit and that to file a suit in the District Court the defendant would be entitled to take an appeal and that it would be impossible to try said cause in the District Court of Wyandotte County and secure a hearing upon an appeal within time so that said bridge could be raised before the anticipated rise in said river next June or July.

And further affiant saith not.

W. H. DANIELS.

Subscribed and sworn to before me this 8th day of February, 1912.

MADELON DEROCHE,
(Seal) *Notary Public.*

My commission expires Jan. 11-1916.

Now therefore, we do oommand you that upon receipt of this writ that you raise and elevate your bridge known as the Ohio Avenue bridge over the Kansas River 6.5 feet or so that the lowest point of superstructure will be 340.26 feet above Saint Louis directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed or that you appear before the Supreme Court of Kansas at the State Capitol in Topeka, Kansas, on the 20th day of February, 1912, at 10 o'clock a. m. of said day and show cause by answer filed herein why you will not do so and have you then and there this writ with your return thereon showing that you have complied with or will comply with the contents hereof or the reasons why you have not or will not do so.

The hearing upon this writ and answer is hereby set for the ..... day of February, 1912.

In Witness Whereof, this writ is signed by the Chief Justice and the clerk of the Supreme Court of Kansas is ordered to attest the same, with the seal of court attached this 9th day of February, 1912.

W. A. JOHNSTON,
Chief Justice.

(Seal)

Attest:

D. A. VALENTINE,
Clerk Supreme Court.

The writs were amended at the argument as indicated in the reported opinion of the Supreme Court of Kansas, at page 993.

ANSWER.

The verified return and answer of the Terminal Company is as follows, the caption being omitted:

Now comes the above named defendant and for its return and answer to the alternative writ and petition herein says:

That said defendant denies each and every allegation and averment in said writ and petition contained and set out not hereinafter specifically admitted.

Defendant admits that the plaintiff is a public corporation organized under Chapter 215 of the Laws of 1905, of the State of Kansas.

That the defendant is a railway corporation duly organized and existing according to law.

That the Kansas River flows through the Kaw Valley Drainage District.

That the defendant herein owns a bridge across the Kansas River within the Drainage District, which is usually termed the "Belt Line Bridge."

Defendant alleges that it is a railway corporation duly organized under the laws of the State of Missouri, and is a resident and citizen of said State of Missouri and not a resident or citizen of the State of Kansas, and as such railway corporation is now and was at the commencement of this action engaged in the business of transporting cars loaded with freight of all kinds in transit from the State of Missouri and from states other than Kansas to and into Wyandotte County and State of Kansas, and from Wyandotte County in the State of Kansas to the State of Missouri and to states other than the State of Kansas.

That the defendant's railway tracks extend from Jackson County, State of Missouri, into and through Wyandotte County and State of Kansas. That its business is that of a switching company, in the transaction of which business said defendant receives from other railroads handling shipments of goods from states other than Kansas, said railroads having no tracks connected with the industries to which said goods are consigned, and transferring cars loaded with such shipments from Kansas City in the State of Missouri to other railways in Kansas, and placing such cars to be unloaded in Kansas at the various industries along the line of defendant's road in Kansas, and in taking cars loaded at such Kansas industries with goods to be transported to states other than Kansas and delivering such cars in Kansas City, Missouri, to various railroads for transportation to many different states, all of which business is interstate commerce and governed by various acts of the Congress of the United States and subject to the rules and regulations of the Interstate Commerce Commission of the United States.

That the defendant's railway tracks situated in the State of Missouri extend to and into Wyandotte County, Kansas, and are connected by means of tracks laid upon and across the bridge mentioned in the alternative writ herein and usually called the Kansas City Belt Railway Bridge, and said defendant has no connection between its railway tracks in Missouri and its railway tracks in Kansas other than those across said Kansas City Belt Railway Bridge, and if such connection is destroyed or the use of its said tracks across said bridge is rendered unavailable said defendant's railway line will be severed and its business as an interstate carrier destroyed, and the business of large numbers of industries in Kansas served by this defendant will be greatly injured and in some cases destroyed.

Defendant further says that the purpose of the writ in this case is to require the defendant to raise the level of its said bridge and tracks across the Kansas River 4.96 feet above their present level and, if this is done, this defendant's said business will be interrupted, its trains cannot be transported across the Kansas River since it will be unable to either go on to or off of said bridge with its engines or cars, and its line of road will be cut and all its interstate business effectually destroyed.

That the present height of the defendant's tracks upon said bridge is such that any additional elevation thereof will preclude the use of said bridge for trains, and the only manner in which such bridge can thereafter become available for use will be by the construction of long approaches at

either end thereof elevated several feet above the present surface of defendant's tracks; but defendant says that the approaches to said bridge upon either end rest upon and extend across various public streets in Kansas City, Kansas, which streets are not under the control of this defendant but under the exclusive control of the city of Kansas City, Kansas.

That said defendant has no right, power, or authority to raise the grade of its tracks or the approaches to said railway bridge unless the grades of the streets upon which said approaches rest are by the order of said Kansas City, Kansas, raised to conform to the grades necessary to the use of said bridge for railroad purposes.

That there is a large amount of private property abutting upon said streets and improvements erected thereon; that said private property and the improvements thereon would be seriously and permanently damaged by the changing of the grade of said streets, and that plaintiff has taken no steps to ascertain the damages to said property or to compensate the owners thereof therefor.

That the city of Kansas City, Kansas, has not raised the grades of any of its said streets upon which said approaches rest, and has refused to make such changes in the grades of said streets as will necessarily be required in the operation of trains by the defendant if the height or elevation of its said railway bridge is increased in accord with the demands of the plaintiff herein, and in fact said city has failed and refused and still does refuse to make any change whatever in the grades of its said streets.

That defendant's tracks on each side of said bridge are intersected by other lines of railway; that if said bridge is raised as desired by the plaintiff, and the defendant should attempt to raise its tracks to conform to said bridge as raised, the tracks of such other lines of railway would be cut in two and rendered useless for service unless such other railway tracks should also be raised by their owners; that the plaintiff has not arranged by voluntary agreement with the owners of said tracks to have said tracks raised or taken any action whatever towards having them raised, and that the owners thereof refuse to raise the same.

It therefore results that this defendant while at all times ready and willing to comply with any lawful or reasonable request or order of public bodies within the territories wherein it operates, ought not to be required to comply with the demand of the plaintiff as set forth in the petition and writ herein, since such compliance will destroy defendant's railway, compel it to violate its duties as a carrier of interstate com-

merce, abrogate its contracts with the industries which it serves, and all without due compensation being made to this defendant or any adequate protection to the business interests threatened.

That such demand of the plaintiff as set forth in the petition and writ herein, is unreasonable, illegal, arbitrary, and beyond the power of said plaintiff to make, and its compliance therewith would require either a total destruction of defendant's business as a carrier of commerce or necessitate wrongful and illegal acts of the defendant upon the public streets of Kansas City, Kansas.

Defendant further says that a compliance with the demands of the plaintiff in the reconstruction of its said bridge and the approaches thereto if permitted will cost this defendant a sum in excess of thirty thousand dollars, and the destruction of its bridge for railway purposes will injure and damage this defendant many hundred thousand dollars.

That the enforcement of the demands of the plaintiff will be to deprive the defendant of its property without due process of law, and to deny to it the equal protection of the laws contrary to the provisions of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and will operate as a direct interference with interstate commerce and a prohibition of interstate commerce, in contravention of the provisions of Section 8, of Article 1, of the Constitution of the United States.

The defendant further says that the plaintiff ought not to have or maintain this action against this defendant for the following reasons:

That at the time of making and entering into the contract hereinafter mentioned, the Kansas City Belt Railway Company was the owner of the railway tracks now owned by this defendant and connected its line of railway in Kansas City, State of Missouri, with its line of railway in Wyandotte County, Kansas, by a temporary bridge across the Kansas River upon the same site now occupied by the railway bridge mentioned in the writ herein and known as the Belt Line Bridge.

That at the time of executing the contract hereinafter set out, said Kansas City Belt Railway Company and the plaintiff herein were in litigation in regard to such bridge and other matters connected with the proposed change in the Kansas River.

That the said plaintiff and said Kansas City Belt Railway Company being desirous of terminating all controversies in regard to the bridge in question, on the 28th day of May,

1907, entered into a contract in writing of the following import and effect:

It was by said parties mutually agreed that the Kansas City Belt Railway Company, in such contract called "the Belt Company", is and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw River to replace the temporary structure, and for that purpose has prepared plans for such permanent bridge duly approved by the chief engineers of the United States Army and by the Secretary of War.

That the Belt Company desiring to construct said permanent bridge at once, without waiting for the termination of suits pending between the said parties, the Belt Company and this plaintiff agreed to compromise and settle their differences upon the following terms and conditions:

The Belt Company agreed that it would proceed with all practicable speed to construct a permanent bridge across the Kaw River where its temporary bridge was then located, upon and in accordance with plans as shown by a blue print attached to said contract. It was further agreed in said contract that said bridge might be, if desired, a double deck bridge, that the east abutment of said bridge should be placed upon the east harbor line as theretofore established by said Drainage District and as indicated upon the map of Messrs. Tuttle & Pike, engineers of said Drainage Board. That the west pier of the bridge as shown upon the blue print should be connected with the west bank of the Kaw River by such means, open trestle or other open work, as the Belt Company may elect; but it was further agreed that if at any time hereafter the Drainage District acting under legal authority shall establish a harbor line west of said west pier, then the Belt Company agreed to build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established, and it was further agreed in said written contract that:

"The Drainage District hereby consents to the construction of said permanent bridge as provided for in the foregoing paragraph and declares that the same when constructed shall constitute a lawful structure at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter establish."

A true copy of said written contract with a true copy of the blue print which was attached thereto are hereto attached marked exhibits "A" and "B" and made a part of this return.

Defendant further says that said plan and blue print attached to said written contract showed and fixed by both words and figures the height at which said permanent bridge should be constructed, and that both parties to said contract were well and fully advised as to the height which said plans showed and said contract fixed for said permanent bridge.

Defendant further says that pursuant to such contract with the plaintiff, said Belt Company did immediately proceed to construct its said permanent bridge, and with all possible dispatch completed the same at an expense of many thousands of dollars; that said permanent bridge was constructed in exact accordance with the plans and blue print attached to said written contract and to the height therein fixed, and such permanent bridge is the bridge mentioned in the alternative writ herein as the Belt Line Bridge, and which this plaintiff is now seeking to require this defendant to raise 4.96 feet by this proceeding.

Defendant further says that after the making of said contract and after the construction of said Belt Line Bridge this defendant by purchase became the owner of all the tracks theretofore belonging to the Kansas City Belt Railway Company and of said Belt Line Bridge, and has succeeded to and now possesses all the rights and interests, both legal and equitable, formerly possessed by said Kansas City Belt Railway Company in and to said property and under said written contract.

Defendant further says that since the execution of said written contract and the construction of said Belt Line Bridge in accordance therewith, no changes have occurred upon said river or in relation to the flow of water therein or in the surroundings of said bridge, no public necessity has arisen which did not exist and was not well known to the plaintiff to exist at the time said contract was executed and said bridge was constructed which rightly and legally require or make necessary a different height for such bridge from that which was fixed in said contract and at which said bridge was constructed.

Defendant further says that if the plaintiff shall now be permitted to require this defendant to raise and reconstruct its said railway bridge in accord with the demand in the petition and writ herein, such action will be in violation with the terms of plaintiff's said written contract. Such act upon the part of the plaintiff has no legal justification based upon any changed conditions as an act of public necessity, and the damage to this defendant necessarily resulting from such unwarranted and illegal demand of the plaintiff will amount if permitted to a sum exceeding Five Hundred thousand dollars.

That if such demands of the plaintiff shall be permitted and its orders that the defendant be required to raise its said railway bridge 4.96 feet above its present height be enforced, then such orders and enforcement are and will be illegal, wrongful, and in violation of the rights of this defendant under Section 12, of Article 1, of the Constitution of the United States prohibiting the impairment of obligations of contracts, and in violation of the Fourteenth Amendment to the Constitution of the United States.

Defendant further says that the plans of the bridge mentioned in the writ herein across the Kansas River, a navigable river wholly within the State of Kansas, showing the full detail of the construction thereof including the height of the same, were duly presented to and duly approved by the chief of engineers of the United States Army and the Secretary of War before the construction thereof was commenced. That said bridge was constructed in accord with the plans so submitted and approved.

Defendant further alleges that the plans for the modification of said bridge according to the demands of the plaintiff as set out in the petition and writ herein, have not been submitted to or received the approval of the chief of engineers of the United States Army or the Secretary of War, as provided in act of the Congress of the United States of March 3, 1899, being Chapter 425, Section 9 of 30 Statutes, page 1151, and any deviation or modification of the plans of said bridge and any change therein without such submission and approval by the chief of engineers and the Secretary of War, will be unlawful, and any order or demand made by the plaintiff requiring changes to be so made in defendant's bridge without first obtaining the approval of the chief of engineers and the Secretary of War, violate the laws of congress in relation thereto and are nugatory and void, and the defendant cannot comply with the demands of the plaintiff as set out in the writ herein without violating the national law above referred to.

Wherefore, defendant prays that said alternative writ be discharged and for costs.

S. W. MOORE,
S. W. SAWYER, and
O. L. MILLER,
Attorneys for Defendant.

State of Kansas, County of Wyandotte, ss.

O. L. Miller, being duly sworn, says he is one of the at-

torneys for the defendant in the above entitled action and is authorized to make this affidavit.

That he has read the foregoing return and answer and knows the contents thereof, and that the statements therein made are true as he is informed and verily believes.

O. L. MILLER.

Subscribed and sworn to before me, a notary public in and for Wyandotte County and State of Kansas, this 29th day of February, 1912. W. E. NELSON,

(Seal) *Notary Public.*

My commission expires Sept. 30th, 1912.

EXHIBIT A.

Agreement, made this 28th day of May, 1907, between Kaw Valley Drainage District, of Wyandotte County, Kansas, hereinafter called the Drainage District, party of the first part, and The Kansas City Belt Railway Company, a corporation organized and existing under the laws of the States of Kansas and Missouri, hereinafter called the Belt Company, party of the second part, witnesseth that:

Whereas, the Belt Company owns and operates a line of railway extending from Jackson County, Missouri, into Wyandotte County, Kansas, and crossing the Kaw River by a temporary bridge which is claimed to be within the limits of the Drainage District, said temporary bridge being one constructed and now used by the Belt Company to replace the permanent bridge destroyed in the flood of June, 1903; and

Whereas, the Drainage District claims that it has the power and right under the laws of the State of Kansas to determine the width of the Kaw River where said bridge is located, and to prescribe the length and method of construction of bridges spanning the Kaw River within the limits of said District; and

Whereas, the Belt Company denies such right and power on the part of the Drainage District, and its trustee under its first mortgage has a suit now pending in the United States Circuit Court at Topeka, Kansas, against the Drainage District, the general object and purpose of which suit is to have declared null and void the laws of the State of Kansas under which the Drainage District has undertaken to act, and to have annulled and set aside the proceedings had and taken by the Drainage District wherein it has undertaken to act under such controverted powers, and to enjoin the Drainage District from issuing any bonds; and

Whereas, the Belt Company is, and has been for some time desirous of constructing a new bridge upon its line of railroad where the same crosses the Kaw River to replace said temporary structure, and for that purpose has prepared plans for such permanent bridge, and the same have been duly approved by the Chief Engineers of the United States Army and by the Secretary of War, but said plans are unsatisfactory to the Drainage District, and it has now pending a suit against the Belt Company to enjoin the construction of such permanent bridge in accordance with said plans; and

Whereas, The Belt Company desires to construct said permanent bridge at once, without waiting the determination of said suits or other litigation of a similar nature, and the parties hereto have agreed to compromise and settle their differences upon the terms and conditions hereinafter named;

Now, therefore, it is mutually agreed by and between the parties hereto as follows, to-wit:

1. The Belt Company agrees that it will proceed with all practicable speed to construct a permanent bridge across the Kaw River where its temporary bridge is now located upon and in accordance with plans as shown by the attached blue-print; that said bridge may be double deck, double track bridge, if desired; that the east abutment of said bridge shall be placed upon the east harbor line as heretofore established by the Drainage District, and indicated on the maps of Messrs. Tuttle & Pike, engineers of said Board, and now on file with the Secretary thereof, and marked by monuments upon the grounds, and the west pier, as shown upon said blue-print, which shall extend to bed-rock, shall be connected with the west bank of the Kaw River by such means, by open trestle or other open work, as the Belt Company may elect, provided, however, that if at any time hereafter it shall be finally determined that the Drainage District, acting under legal authority, has established, or shall have established, a legal harbor line west of said west pier, and that the lawful width of said Kaw River shall exceed the distance between said east harbor line and said west pier, and that the Drainage District has the lawful right to require the construction of bridges for the full width of said river, and to cause the channel of said river to be widened to correspond therewith, and all unlawful obstructions to be removed therefrom, then the Belt Company agrees that it will build and construct such additional span as may be necessary to connect said west pier with the west bank at such harbor line so lawfully established.

2. The Drainage District hereby consents to the construction of said permanent bridge as provided for in the

foregoing paragraph, and declares that the same, when constructed, shall constitute a lawful structure, at the same time not waiving any right it may have or may acquire to require the construction of an additional span from said western pier to any harbor line it may have established or may hereafter establish.

3. If the power and authority of the Drainage District shall not be finally sustained and upheld as above provided, then this agreement shall be without prejudice to either of the parties hereto, and, in any event, this agreement, as between other persons, shall be without prejudice to the rights of the Drainage District and any person or corporation in respect to any litigation now pending or which may be hereafter brought.

In witness whereof, the parties have caused these presents to be duly executed the day and year first aforesaid.

(Seal) KAW VALLEY DRAINAGE DISTRICT.
By J. O. MILLER, *President.*

L. J. GILLIS, *Secy.*

THE KANSAS CITY BELT RAILWAY COMPANY,
By J. E. HURLEY.

Attest:
C. C. RIPLEY, *Secy.*
(Seal)

The answer and return of the Southern Company is the same in substance as the answer of the Terminal Company, except that the allegations in regard to the contract of 1907 between the Drainage District and the Belt Company are omitted altogether, and the allegations in regard to the approval plans by the Secretary of War and the Chief of Engineers are modified.

The cases were heard together and one judgment rendered in both cases, as follows:

These causes come on for decision; and thereupon, it is ordered and adjudged that judgments herein be entered in favor of the plaintiff and against the defendants, and that the peremptory writ of mandamus issue to the defendants commanding them to forthwith remove from the channel of the Kansas River all obstructions of every kind and character where their lines cross the stream, and commanding the Kansas City Terminal Railway Company to clear such channel to a height of 342.73 feet above the St. Louis directrix, and commanding the Kansas City Southern Railway Company to

clear such channel to a height of 340.26 feet above the St. Louis Directrix. It is further ordered that the defendants pay the costs of this proceeding taxed at $..... and hereof let execution issue.

The defendants filed motions for a rehearing, which were overruled. The Supreme Court of Kansas declining to issue writs of error to this court, the writs were allowed with supersedeas by Mr. Justice Van Devanter.

BRIEF.

I.

There is no foundation for the motion to dismiss, affirm or advance.

It is well settled that a motion to dismiss will be overruled if any federal question appears from the record. (*Chicago Life Insurance Co.* v. *Needles,* 113 U. S., ~~1084~~ 574.)

A motion to affirm will not be entertained if the questions raised are fairly debatable. (*Douglass* v. *Wallace,* 161 U. S., 346; *Texas etc. Co.* v. *Southern Pacific Co.,* 137 U. S., l. c., 55.)

In other words, the motion to dismiss goes to the jurisdiction of the court. The motion to affirm assumes the jurisdiction of the court but will not be entertained unless the federal question upon which the jurisdiction was taken is not debatable.

While there are cases to the effect that the court may refuse to entertain jurisdiction on the ground that no federal question is involved, where the particular question, though federal in its nature, has been foreclosed by repeated decisions of the court, they apply only where the question is one which has palpably been decided on precisely the same facts. Where the court must examine the cases carefully with reference to the facts of the particular case to determine whether they are controlling, the motion must be overruled, because the question up for consideration is not how the federal question involved should be decided, but whether there is any federal question involved. This is very clearly stated

by Mr. Chief Justice White in *Louisville etc. Ry. Co.* v. *Melton*, 218 U. S., 36. We quote from the opinion at page 49:

> We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: (a) because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; (b) because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and (c) because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject.

It is unquestionably necessary to analyze the facts in this case in order to reach a proper determination of the federal question involved, particularly as the reasonableness, and in consequence, the constitutionality of the order of the Drainage District must depend upon the particular circumstances of the case. In *Chicago, Burlington & Quincy* v. *Drainage Commissioners*, 200 U. S., l. c. 592, 593, the court says:

> And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose.

In *Washington Railway Company* v. *Fairchild,* 32 Supreme Court Rep., 535, Mr. Justice Lamar says:

> The question in each case must be determined in the light of all the facts.

In *Wisconsin M. & P. R. Co.* v. *Jacobson,* 179 U. S., 287, it is said:

> In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connection between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute or a regulation provided for therein is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity of the reverse of legislative action.

II.

The record properly presents substantial and important federal questions which should be resolved in favor of the plaintiff in error.

It is important to consider that these cases were heard upon the alternative writs, the allegations of which were denied in the defendants' answers, and upon the affirmative allegations in the defendants' answers which necessarily stand admitted, as the plaintiff withdrew its reply and submitted the cases upon the pleadings. No evidence was introduced by either party.

It is alleged by the defendants, and it is therefore to be taken as admitted, that the raising of the bridges would entail a large

expense upon them; that their rails approaching the bridges could not be connected with them as elevated, except by corresponding elevations in the grades of the streets in and across which the rails are laid and corresponding elevations in the rails of the railway companies whose tracks have to be crossed; that the City of Kansas City, Kansas, has refused to change the grades of these streets so that the defendants cannot construct their tracks in the streets at such elevation as would make connections with the rails on the bridges as elevated, without committing unlawful acts in the streets, to the damage of abutting property owners; that unless such municipal authority is given for the elevation of the streets so that rails may be laid therein to connect with the elevated structures, the bridges cannot be availed of by the defendants and their lines will be interrupted and they will be prevented from carrying on their business as common carriers of interstate commerce between Kansas and Missouri and other states; that the action of the Drainage Board is arbitrary and without any reasonable necessity.

It further appears by natural inference from the pleadings, that there has been no hearing or opportunity to be heard on the part of the railway companies. Under these conditions, we confidently maintain that the action of the Drainage Board is so arbitrary as to clearly amount to a deprivation of property without due process of law, that it denies to the defendants the equal protection of the laws and that it is an interference with Interstate Commerce.

(a) The Act of January 15th, 1866 (14 Stat. L. 66,) provides:

> Every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops; government supplies, mails, freight and property on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination.

This is the defendants' franchise for conducting interstate transportation. The right thus granted by Congress derives its authority from the commerce clause of the Federal Constitution. It is altogether independent of state action. State action is pow-

erless to interrupt its operation. If the Drainage Board had arbitrarily ordered the removal of the bridges, as it in effect did, would there be any question of its invalidity, insofar as the flow of interstate commerce over the tracks of the railway companies was thereby destroyed? Concede for the sake of argument, which we do not admit, that the State of Kansas, with the concurrence of federal authorities has the power to cause the defendants' bridges to be elevated at their expense. Yet, it does not follow that this right can be so arbitrarily exercised as to work the dismemberment of an interstate carrier. (*In re Debs*, 158 U. S., 564).

On the one hand, the city authorities of Kansas City, Kansas, say, "We will not elevate the streets so that you may elevate your tracks as they approach the bridge when raised to the required height; if you undertake to interfere with the public streets of our city, we will enjoin you or prosecute you." On the other hand, the Drainage Board says: "True, you have no right to reconstruct your tracks in the public streets so as to reach the bridge elevated to the height which we require, but, nevertheless, you must elevate."

The office of the writ of mandamus is not to compel the doing of an impossible thing. Any attempt to do so is arbitrary exercise of power, which the law does not sanction. (*Dobbin* v. *Los Angeles*, 195 U. S., 223). The defendants, in the court below, insisted that the Act of Congress above quoted, which had been enacted in pursuance of the Constitution of the United States, was in fact the supreme law of the land, and that the rights which it enjoined thereunder, could not be arbitrarily taken from it. This claim so advanced by the railway companies was denied by the Supreme Court of Kansas.

True it is that the railway company must exercise its rights derived from the federal constitution and laws with due regard to a proper exercise of the police power of the state. Where, as in this case, the Drainage Board fixes the height of the rails of the Southern Company at 340.26 feet above the St. Louis Directrix, and the City of Kansas City, Kansas, fixes the height of its rails at 6.5 feet below that elevation, it is not a reasonable police regulation of the State of Kansas to compel the railway company to conform to both requirements. If the Drainage Board can maintain writs of mandamus to compel the railway companies to con-

form to the elevation fixed by it, it would be equally competent for the City of Kansas City, Kansas, to maintain mandamus suits against the railway companies to compel them to adjust their rails to the elevation required by it.

(b) It appears from the pleadings that the Drainage Board merely issued the orders requiring the raising of the bridges to the designated elevation without any hearing or opportunity to be heard on the part of the railway companies. This in itself, and regardless of the ultimate reasonableness of the order, presents a serious federal question. As it is said in *State of Washington ex rel.* v. *Fairchild,* 32 Supreme Court Rep., 535, l. c. 538,

> If this were true, the defendants' position would be correct, for the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given an opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established.

The act of the legislature of the State of Kansas under which the Drainage District acted, (Ch. 215, Laws of 1905), provided, (p. 309), that the District should have the power to prescribe, regulate and fix the height of the superstructure above the water, and the length of all spans, and the location of the piers of all bridges across water courses situated in the district but does not provide for any hearing before the District or its officers prior to such action. The act of the Board, therefore, in ordering the raising of the bridges of the railway companies without notice or opportunity to be heard by proof and argument, was a taking of property without due process of law.

(c) The hearing before the Supreme Court of Kansas, and the judgment pronounced by it, amount to a denial of due process of law. The averments in the alternative writs of mandamus were denied under oath by the defendants. The affirmative allegations in the defendants' verified answers stand admitted. No evidence was introduced.

How could the court, having regard for the usual forms of judicial procedure, pronounce judgments for the plaintiff? It could only do so upon the assumption that the allegations in the alternative writs, which were denied by the defendants, imported

absolute verity. No such provision is contained in the Kansas statutes regulating proceedings in mandamus. (Sections 6310, 6321, General Statutes of Kansas, 1909.) If any such provision were attempted to be enacted, it would be void.

The Kansas Supreme Court states, (page 992 of its opinion): "We can only consider the case upon the allegations contained in the writ and in the answer and return." How could the court lawfully consider the allegations in the writs and assume them to be true without evidence, when they were denied in the answer, which was under oath? But the court is not content with finding the allegations of the alternative writ to be true, although denied and unsupported by evidence, but has recourse, page 993, to "certain blue prints or maps, the annual report of the chief of engineers, and a report with map and descriptions of harbor lines, etc."

Furthermore, the Supreme Court of Kansas by a curious process of reasoning, finds itself unable to make permanent the alternative writs of mandamus in respect to the elevation of the bridge. It specifically holds that it has no power to order the elevation of the bridges, until plans therefor have had the approval of the federal officers (which has not been done), as required by act of Congress, saying:

> There is nothing in this decision (*Cummings* v. *Chicago*, 188 U. S., 410) indicating that a bridge across such waters can be lawfully erected or *reconstructed*, until the plans therefor are approved as required by the Act of 1899. It is familiar doctrine that, when Congress has legislated upon a subject within its power, such legislation is binding upon the states, and for us to hold now that the defendant can be compelled by mandamus to raise its bridge as demanded, without obtaining the approval of the plans therefor as required by act of Congress, would be to disregard rather than to obey such legislation.

The court finds, therefore, that it cannot lawfully grant the relief prayed for. The command of the alternative writ in the case of the Southern Company was, "that you raise and elevate your bridge known as the Ohio Avenue bridge over the Kansas river 6.5 feet, or so that the lowest part of the superstructure will be 340.26 feet above the St. Louis Directrix, and that you commence said work at once and proceed with the same as rapidly as possible until completed, or that you appear before the Supreme Court of Kansas, etc."

The Southern Company was ordered to show cause why it should not raise its bridge 6.5 feet. The Kansas Supreme Court in the language above quoted, held that it had no power to grant this specific relief, which was all the relief asked for in the alternative writ, but the court undertakes to do by indirection what it cannot do by direction. It cannot grant the relief claimed, because the law prohibits it from so doing, but it adopts the expedient of issuing the peremptory writ to the Southern Company commanding it, *not* to elevate its bridge, but to remove "all obstructions" of every kind; and to clear the channel to a point which corresponds to the height to which it was to elevate the bridge. The removal of "all obstructions" beneath the specified elevation, naturally and necessarily means that the piers must be removed from the river and that a large portion of the superstructure must also be removed. The same is true of the Terminal Company except that the elevations are different.

In other words, the court said in the alternative writs:

> Raise your bridge to the required height, or show cause why you are not compelled to do so.

In the peremptory writ it says:

> Tear out your bridge, piers, abutments, and superstructures, everything below the prescribed elevation.

The result is that the railway companies are haled into court to meet a cause of action, and they do meet it fairly, in the opinion of the court. That ought to end the proceedings. But the court then proceeds to pronounce judgments against the railway companies upon another and different cause of action, one theretofore not mentioned in the papers or pleadings, and one which the railway companies had no reason to anticipate they would be called upon to meet. If the court had gone a step further, and while passing upon the rule to show cause why the bridge should not be elevated, had proceeded to order the defendant to remove all of its railway and road-bed from the State of Kansas, it would not be contended that such a judgment constituted due process of law; and yet, while the illustration is an extreme one, the principle is precisely the same. It is submitted that the action of the Kansas Supreme Court is so contrary to the practice customary in such cases, and so regardless of the rights of the defendant that it must be considered by this court as subversive of all of the usual

recognized principles of jurisprudence, and so arbitrary as to amount to a deprivation of the property of the railway companies without due process of law, and a denial to them of the equal protection of the law.

The judgments of a court, as well as the statutes passed by the legislature, may be the act of a state within the meaning of the 14th Amendment.

In *Chicago, etc., Railway Company* v. *Chicago*, 166 U. S., 226, Mr. Justice Harlan, says at page 233:

> But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, "violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state." This must be so, or as we have often said, the constitutional prohibition has no meaning, and "the state has clothed one of its agents with power to annul or evade it." *Ex parte Virginia*, 100 U. S., 339, 346, 347 (25; 676, 679); *Neal* v. *Delaware*, 103 U. S., 370 (26; 567); *Yick Wo* v. *Hopkins*, 118 U. S., 356 (30; 220); *Gibson* v. *Mississippi*, 162 U. S., 579 (40; 1078). These principles were enforced in the recent case of *Scott* v. *McNeal*, 154 U. S., 34 (38; 896), in which it was held that the prohibitions of the 14th Amendment extended to "all acts of the state, whether through its legislative, its executive, or its judicial authorities. * * * * The mere form of the proceeding instituted against the owner even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.
>
> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

To the same effect see *Scott* v. *McNeal*, 154 U. S., 34; *Washington Railway Company* v. *Fairchild*, 32 Sup. Ct. Rep., l. c. 538.

(d) It appears that the assent of the Chief of Engineers and of the Secretary of War to the elevation of the bridges to the height desired by the Drainage District, as required by act of Congress of March 3rd, 1899, has not been secured. The right to have the bridges remain in their present condition until these federal authorities shall authorize the reconstruction or elevation thereof and approve the plans therefor, is a right, privilege and immunity conferred by the laws of the United States of which the railway companies are clearly deprived by the judgment of the Kansas Supreme Court which requires either the elevation of the present bridges or the construction of new bridges, in direct contravention of the act of March 3rd, 1899.

If the judgments of the Supreme Court of Kansas are of any validity whatsoever, it must necessarily be upon the assumption that the peremptory writ, in effect, commands the elevation of the bridges to the required height since that was the only question upon which the court was authorized to pronounce judgment. The court said, page 996:

> The real object (of the plaintiff), is to clear the channel to the height mentioned, from obstructions, the subsequent elevation or rebuilding of the bridges in question being matters in which the defendants rather than the plaintiff are vitally interested.
>
> While it is to be presumed that the bridges will in fact, be elevated or rebuilt, it is not deemed necessary that we make an order to that effect, but the writs will be allowed in both cases requiring the defendants forthwith to remove from the channel of the Kansas River all obstructions of every kind, etc.

The court does not order the elevation of the bridges, because confessedly it has not the power to do so, until the Federal authorities shall have approved the plans. It seeks, however, to accomplish the same result in this round-about way; but it is obvious to anyone that if the approval by the Federal authorities is necessary for the elevation or rebuilding of the bridge, it must be equally necessary for the removal of obstructions of the river *which can only be accomplished by the elevation or rebuilding of the bridge.*

The judgment of the court proceeds indirectly and in a round about way, to command the elevation or reconstruction of the bridges, without the approval of the Chief of Engineers or of the

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Secretary of War. The railway companies claimed that this could not be done until the plans should have the approval of the proper Federal authorities. This claim was denied by the Kansas Supreme Court, and thus an important Federal question is presented.

III.

The record in the case against the Terminal Company presents an additional Federal question, in that the order of the drainage district and the judgment of the Kansas Supreme Court enforcing it, impair the obligation of the Terminal Company's contract of 1907 with the drainage district.

(This paragraph is applicable only to the case against the Terminal Company.)

It is alleged in the alternative writ and admitted in the answer, that the Kaw River is navigable.

The Terminal Company constructed its bridge across the Kaw River under a dual authority, *first*, under plans expressly approved as to elevation as well as other details, by the Secretary of War and the Chief of Engineers, as provided in Section 9 of the River and Harbor Appropriation Act of March 3, 1899, (30 Stat. L., 1151), and, *secondly*, by express written contract with the Drainage District providing for the construction of this specific bridge according to the plans and specifications thus approved by Federal authorities, which were attached to the contract. The Drainage District, in this contract, declared the bridge thus to be constructed to constitute a lawful structure. The bridge therefore was not only a lawful structure under both state and federal authority, but was constructed under and in pursuance of a contract with the Drainage District, acting under authority of the laws of the State of Kansas, which contract prescribed the elevation of the structure. It is this elevation, thus fixed, which the court orders to be changed.

After the bridge had been constructed under this dual authority, the Drainage District alone, and without the concurrence of any federal authority, and acting under an express statutory power, purporting to confer upon it the right to prescribe the elevation of the superstructure of bridges across the Kansas River, determined that this bridge of the Terminal Company should be ele-

vated approximately 5 feet, and, without notice to the Terminal Company or hearing or opportunity to be heard, made its order requiring the latter at its own expense to elevate its bridge to the prescribed height. It is alleged in the answer, and stands admitted upon this record, that there was no change or alteration in conditions in respect to the bridge or the Kansas River or anything else intervening between the Drainage District's approval of the bridge as constructed and its determination to cause the bridge to be elevated.

Upon these admitted facts, it is clear that the obligation of the Terminal Company's contract with the Drainage District is impaired by the judgment of the Kansas Supreme Court in awarding the peremptory writ of mandamus, which carries into effect and execution the determination of the Drainage District to depart from its contract.

The Drainage District was organized under the laws of Kansas of 1905, Chapter 215, in which the state delegated to the Drainage District legislative functions in respect to the construction of bridges and by Section 6 of that act undertook to confer upon the Drainage District the power to regulate the length of spans of bridges and the height of their superstructures. The order of the Drainage District, therefore, was the act of the state. (*Walla Walla* v. *Water Company*, 172 U. S., 1.) Not only the order of the Drainage District but also the judgment of the court declaring the order valid and directing and ordering that it be carried into execution and effect, operated to impair the obligation of the Terminal Company's contract.

Dobbin v. *Los Angeles,* 195 U. S., 223;
United States v. *Railroad Company,* 134 Fed., 969, 143 Fed., 224;
22 Op. Atty. Gen., 343;
Washington Bridge Co. v. *State,* 18 Conn., 53;
Commonwealth v. *Bridge Co.,* 2 Gray (Mass.) 339;
Commonwealth v. *Canal Co.,* 66 Pa. St., 41;
City of Buffalo v. *Delaware etc. Co.,* 110 N. Y. Supp., 488.

The defendant in error endeavors to justify the act of the Drainage District in impairing the obligation of its contract with the Terminal Company by invoking the rule that the state, in the

exercise of its police power in the protection of navigation and in the encouragement of drainage enterprises, may require public corporations at their own expense to make alterations in their bridges or other structures, and they cite in support of that position, *Railway Company* v. *Chicago*, 166 U. S., 226; *Railway Company* v. *Illinois*, 200 U. S., 561; *Northern Pacific Railway Company* v. *Duluth*, 208 U. S., 583; *Railway Company* v. *City of Connersville*, 218 U. S., 336. None of the cases cited are controlling in the situation presented here.

The cases cited by the defendant in error, so far as relevant, and other cases of a similar nature, may be readily classified as follows:

(1) Cases where the bridge was built under some general authority without specific authorization by Congress, and changed conditions have rendered it an actual obstruction to navigation.

(2) Cases where the statute of the state or act of Congress specifically authorizing the bridge, contained a provision reserving the right to alter, amend or repeal the right granted by a provision that the bridge should not in any way obstruct navigation; and the bridge has actually become an obstruction to navigation by reason of changed conditions.

(3) Cases where the bridge was built under general authority across a public highway or stream, in the nature of a public highway, the charter of the company containing a requirement that it should restore all such highways or streams to a condition of usefulness, and by reason of a subsequent change in conditions the usefulness of the stream or highway requires the change in the bridge.

Among the cases of the first class are the following:

New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S., 453;
Union Bridge Co. v. *U. S.*, 204 U. S., 364;
Monongahela Bridge Co. v. *U. S.*, 216 U. S., 177.

Among the cases of the second class are the following:

Union Bridge Co. v. *U. S.*, 204 U. S., 364;
New Orleans Gas Light Co. v. *Drainage Commission*, 197 U. S., 453;
W. Chicago R. R. Co. v. *Chicago*, 201 U. S., 506;
Bridge Co. v. *U. S.*, 105 U. S., 470.

Among the cases of the third class are the following:

C. B. & Q. Railroad Co. v. *Drainage Commission*, 200 U. S., 561;

Northern Pacific Ry. Co. v. *Duluth*, 208 U. S., 583;

Cincinnati etc. Ry. Co. v. *Connersville*, 218 U. S., 336.

In all of these cases there is present the element of changed conditions arising subsequently to the building of the structure. In none of them was the structure authorized specifically by the authority having control of the stream, unless there was at the same time in the act of authorization reserved expressly, or by reasonable interpretation of the language, the right to make changes in the future.

The only decisions which we have found in the United States courts where an attempt has been made to require a change in a bridge which had been built under specific authority of an act of Congress and in exact compliance with the plans approved by Congress or under its authority, are *United States* v. *Parkersburg Railroad Co.*, 134 Fed., 969, and the same case in the Circuit Court of Appeals reported in 143 Fed., 224. Both the Circuit Court and the Circuit Court of Appeals held that the bridge could not be changed except under the authority of Congress and with a provision for just compensation.

We respectfully submit that the motions should be overruled.

SAMUEL W. MOORE,

SAMUEL W. SAWYER,

Attorneys for Plaintiffs in Error.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* KAW VALLEY DRAINAGE DISTRICT.

KANSAS CITY TERMINAL RAILWAY COMPANY *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 313, 314. Argued March 19, 20, 1914.—Decided April 6, 1914.

This court will read pleadings as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S. 375.

This court must take the judgment under review as it stands and if it is absolute and not conditional it cannot be qualified by speculation as to what may in fact happen.

An out and out order of a state court to remove a bridge that is a necessary part of a line of interstate commerce is an interference with such commerce and with a matter that is under the exclusive control of Congress.

Interstate commerce is not a matter that is left to the control of the States until further action by Congress; nor is the freedom of that commerce from interference by the States confined to laws only; it extends to interference by any ultimate organ.

A direct interference by the State with interstate commerce cannot be justified by the police power; and so *held* that the destruction of a bridge across which an interstate railroad line necessarily passes cannot be justified by the fact that it helps the drainage of a district.

Quære, whether a consent by a Drainage District to the construction of a railroad bridge is not to be regarded as a license rather than an abdication of the continuing powers of the District to require subsequent elevation of the bridge.

87 Kansas, 272, affirmed.

THE facts, which involve the construction and validity,

under the commerce clause of the Federal Constitution, of orders of the state courts of Kansas directing railroad companies to remove bridges on lines of interstate commerce, are stated in the opinion.

Mr. Samuel W. Moore, with whom *Mr. Samuel W. Sawyer* and *Mr. James M. Souby* were on the brief, for plaintiffs in error.

Mr. Thomas A. Pollock for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases arise upon petitions for mandamus filed by the defendant in error, the Kaw Valley Drainage District. The allegations are that the Kansas River flows through the District, is a navigable stream, and in 1903 overflowed its banks, flooded a large part of Kansas City, Kansas, and caused great loss; that the harbor lines established by the United States and the lines for a levee along the banks established by the plaintiff substantially coincide; that the defendants respectively own bridges across the river which at their present elevation cause it to overflow; and that the plaintiff in pursuance of the power given to it by the State has ordered the defendants respectively to raise these bridges to specified heights and to remove the old ones, which the defendants have refused to do. On these petitions alternative writs issued, and thereupon the defendants made return, each making a general denial and setting up that its railway tracks across the bridge were used in commerce among the States and that such commerce would be cut off and destroyed by enforcement of the order, and claiming the protection of the Constitution, Art. I, § 8, (cl. 3). They each alleged also that to raise the bridges would require a raising of the grades of the streets for the approaches, and that the right to raise them depended on the consent of Kansas City, which the city refused to give; that the raising would cut in two inter-

secting tracks of other roads, that this could not be done without the consent of such roads, which they also refused; that the raising would do permanent damage to private property abutting on the streets that would have to be raised, and that the plaintiff had taken no steps to compensate the owners; that the damage to the defendant would exceed large sums mentioned; and that the plans for the new bridges have not been approved by the Secretary of War. Act of March 3, 1899, c. 425, § 9. 30 Stat. 1121, 1151. Each defendant relies upon the Fourteenth Amendment. The Terminal Company also alleged a contract with the Drainage District which was thought to preclude its present requirement, and to be protected by the Constitution, Art. I, § 10. The cases were heard on the alternative writs and the returns, and the Supreme Court of the State issued peremptory writs requiring the defendants to clear the channel to specified heights. 87 Kansas, 272.

Motions to dismiss were presented at the last term but were denied, as the record shows not only that rights under the Constitution and laws of the United States were specially set up and claimed, but that the questions concerning them are not of a kind to be dismissed.

The Supreme Court recognized that it could not order the bridges to be raised to the required height without the authority of the Secretary of War. Therefore we may lay on one side the somewhat surprising answer made to the allegations that the consent of the city and other railroads was necessary and was refused—the suggestion, namely, that if the defendants wanted to do it they would find some way of reaching their end. See *Louisville & Nashville R. R. Co.* v. *Central Stock Yarks Co.*, 212 U. S. 132, 144. It was not suggested that the railroads had the power to reach the result by eminent domain. See *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 27. We lay on one side also various

over-refined objections to the defendants' pleadings made in the argument here, saying only that we read them as alleging what they fairly would convey to an ordinarily intelligent lawyer by a fairly exact use of English speech. *Swift & Co.* v. *United States*, 196 U. S. 375, 395. But the court went on, on the assumption that it would lead to the elevation of the bridges and seemingly for the purpose of accomplishing indirectly what it admitted that it could not do directly, to make an unqualified absolute order, as we have said, that the defendants should clear the channel of all obstructions on their lines up to the specified heights—in other words to remove the bridges as they stand.

These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the court and of one authority at least not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact. They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a State could not stop the operation of the lines by an injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. *Williams* v. *Talladega*, 226 U. S. 404, 415, 416. It would seem that the same principle applies to railroads under the commerce clause of the Constitution, especially if taken in connection with the somewhat similar statute now Rev.

Stats., § 5258. And so it is held. *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334. *Mississippi R. R. Commission* v. *Illinois Central R. R. Co.*, 203 U. S. 335.

The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. "The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic." *Illinois Central R. R. Co.* v. *Illinois*, 163 U. S. 142, 154. *Austin* v. *Tennessee*, 179 U. S. 343, 349. *Atlantic Coast Line R. R. Co.* v. *Wharton*, 207 U. S. 328, 334. To destroy the bridges across which these railroad lines necessarily pass is at least as direct an interference with such commerce as to prohibit the importation of cattle or oleomargarine, or the export of natural gas. *Hannibal & St. Joseph R. R. Co.* v. *Husen*, 95 U. S. 465. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 262. Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass.

A strong argument was made for the plaintiffs in error that they never had been allowed their day in court, as matters put in issue by them, such as the necessity of the change, were assumed against them. It was urged with seeming justice that, granting that, as was said by the court, the order of the Drainage District was *prima facie* correct, still when that order was challenged in the pleadings, it could not be assumed to be valid at a hearing upon

the writs and returns. But we express no opinion upon this point or upon claims under the Fourteenth Amendment, as what we have said sufficiently decides the cases. The argument of the Terminal Company upon the contract with the Drainage District does not impress us. By way of compromise the Terminal Company's predecessor agreed to build a permanent bridge according to a plan, and the Drainage District "hereby consents to the construction of said permanent bridge . . . and declares that the same when constructed shall constitute a lawful structure . . . not waiving any right . . . to require the construction of an additional span." This coming from a board created to exercise police power not unnaturally would be construed rather as a license than as an abdication of a continuing duty, on which we are asked to take notice that new light had been shed by a subsequent flood that has given rise to cases before this court. But for the reasons that we have given the judgments must be reversed.

Judgments reversed.